Office Supreme Court U. S.
FILED.
NOV 19 1885
JAMES H. McKENNEY.
CLERK.

1165 1108

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1157.

JNO. F. FLETCHER AND W. WESENBERG, PLAINTIFFS IN ERROR,

versus

HAMLET, BLISS & ELLIOTT, DEFENDANTS IN ERROR.

MOTION TO ADVANCE CAUSE AND TO DISMISS OR AFFIRM.

BRIEF OF PLAINTIFFS IN ERROR IN ANSWER TO MOTION.

EDGAR H. FARRAR,
ERNEST B. KRUTTSCHNITT,
Attorneys for Plaintiffs in Error.

NEW ORLEANS, November, 16th, 1885.

Thomason, Printer, 36 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 1157.

JNO. F. FLETCHER AND W. WESENBERG, PLAINTIFFS IN ERROR,

versus

HAMLET, BLISS & ELLIOTT, DEFENDANTS IN ERROR.

MOTION TO ADVANCE CAUSE AND TO DISMISS OR AFFIRM.

BRIEF OF PLAINTIFFS IN ERROR IN ANSWER TO MOTION.

Defendants in error have combined a motion to advance this cause under Rule 32, §4, with a motion to dismiss or affirm. The practice of combining the two motions strikes us as novel, and may lead to some confusion; but we shall treat the two motions as though made separately.

MOTION TO ADVANCE.

To this motion, we have no objections to urge. We submit it for such action as to the Court may seem proper, but respectfully insist upon our right to a regular hearing and trial upon a day to be fixed by your Honors.

Motion to Dismiss or Affirm.

I.

Defendants in error do not show, or even allege, any color of right to a dismissal. Under these circumstances, the jurisprudence of this Court is well settled, that a motion to affirm merely will not be sustained.

Whitney vs. Cook, 99 U. S. 607.

Davies vs. Corbin, 113 U. S. 687.

This point alone disposes of the motion; but we submit:

II.

That the decision of the Court *a qua* was erroneous, and should eventually be reversed by your Honors.

Statement of the Case.

The facts of the case are as follows: and we take them entirely from the opinion of the Judge *a quo*, annexed to the transcript filed in this Court, where the facts are correctly stated, and we thus save yours Honors the necessity of referring from one part of the record to the other.

(1)

(*a*) Hamlet, Bliss & Elliott, citizens of Alabama, filed a suit in the Civil District Court for the Parish of Orleans, against Fletcher, Wesenberg & Co., alleged to be a commercial firm, residing and doing business in New Orleans, and composed of Jno. F. Fletcher, Thomas O'Connor, William Wesenberg and George M. Fletcher. This suit was filled March 17th, 1883.

(*b*) Service of citation was made on the firm and on William Wesenberg, through William Wesenberg in person, April 6th, 1883.

(*c*) Wesenberg appeared, alleging that he did so individually and on behalf of the firm, filed exceptions on his own behalf and on behalf of the firm.

(*d*) These exceptions were tried and sustained by the Civil District Court in April, 1883; an appeal was taken to the Supreme Court of the State; the judgment of the Civil District Court was reversed, and the case was remanded for further proceedings.

(*e.*) Wesenberg then answered, in the lower court, May 22d, 1884.

(2)

(*a*) On June 4th, 1884, process was served on Jno. F. Fletcher, individually, and as a member of the firm.

(*b*) On June 17th, 1884, Fletcher filed exceptions individually, and on behalf of the firm.

(*c*) These exceptions were referred to the merits, and on November 28th, 1884, Fletcher filed his answer.

(*d*) The case was set down for trial December 4th, 1884, but not being reached, was ordered to be continued to the next jury term.

(*e*) February 5th, 1885, W. Wesenburg and Jno. F. Fletcher joined in a petition for the removal of the case to the U. S. Circuit Court, for the Eastern District of Louisiana, on the ground that they were citizens of Tennessee, and that plaintiffs were citizens of Alabama, and that the suit involved a controversy wholly between citizens of different States. Bond was filed, and the case removed to the Federal Court.

(3)

(*a*) A motion to remand was made in the Circuit Court, on the grounds: (1) That the petition for removal was not filed at the term of the Civil District Court, at which the cause could be first tried: and (2) Because all defendants did not join in the petition to remove.

(*b*) This motion was granted by the Circuit Court.

W. Wesenberg and Jno. F. Fletcher, have taken a writ of error from the order of the Circuit Court remanding the cause.

ARGUMENT.

Allow us, at the outset, to brush away all cobwebs surrounding this case. Allow us to bring your Honors to a consideration of the single and well defined point upon which we hope and expect a favorable consideration of our case. We have carefully subdivided our statement of the case, so as to show your Honors the exact point at which Jno. F. Fletcher became a party to the record, and at which he acquired an interest in this controversy. Plaintiffs sued an alleged firm of Fletcher, Wesenberg & Co., and the four alleged partners in that firm. They served process on but one partner, Wm. Wesenberg, who appeared for himself, and as he alleged, on behalf of his firm. The suit thus moulded by plaintiffs had, on June 3d, 1884, progressed to such a point, that we frankly concede that it could not have been removed to the Circuit Court.

But on the succeeding day, June 4th, 1884, plaintiffs saw fit to give an entirely new character to the litigation. They were not contented with the form in which their suit then stood; they cited Jno. F. Fletcher and brought him into court. Fletcher filed exceptions in June, 1884, which were referred to the merits (and not tried), and he then, at a subsequent term of the Civil District Court, filed his answer, and at the same term filed a petition in which his sole co-defendant joined, and in which both prayed for a removal of the cause to the Federal Court.

At this point it may be well to call attention to the fact, that the Civil District Court for the Parish of Orleans has but one term per annum, a term which begins on the first Monday in November, and ends on the third day of the following July. This is true, and is admitted.

Brief of Defendants in Error, p. 1.

Louisiana Revised Statutes, §1928.

Béthancourt vs. Stephens, 19 An. 292.

Fisk vs. Moss, 21 An. 329.

Blessey vs. Kearney, 24 An. 289.

We consider it important to dwell upon this matter, because we have, in our statement, followed the Judge *a quo*, who refers to a continuance of the case from one jury term to another. The more accurate expression would be, from one jury week to another—the jury weeks occurring at intervals during a term, and being loosely and inaccurately, but almost universally referred to as "jury terms."

The suit never was at issue, and could never have been tried in its new form, given to it by plaintiffs, until the term of the Civil District Court, at which the petition for removal was filed, That ~~the~~ term began on the first Monday in November, 1884, and lasted until July, 1885. Fletcher's answer and petition to remove were both filed at that term. Plaintiffs below (defendants in error) seek to escape our reasoning. by stating that no new issues were raised by serving Fletcher with process; that the service was unnecessary and useless; that Fletcher was already in Court, through the process served on his firm through his partner. To this position, the answer is plain.

Your Honors will listen with suspicion to a party alleging that he has done a vain and trifling act; that he has served an adversary twice with the same process, and provoked two contests where one would answer all purposes. Such a course is improbable, and a closer investigation will, in all likelihood, show a good reason for the double service of process.

But is it true that no new issue was brought into the cause by service of the process upon Fletcher? Such was the view taken by the Judge *a quo*, but we submit that it is incorrect.

In the case of D'Arcy vs. Ketchum, 11 Howard, 165, your Honors held, that "where a judgment was given in New York against two partners, one of whom resided in Louisiana, and was never served with process, and an action was brought against him in Louisiana on this judgment, a peremptory exception in the nature of a demurrer, that the judgment sued upon is not one upon which such action can be brought against the defendant in this Court, was well founded," and that "Congress did not intend, by the Act of 1790, to declare that a judgment rendered in one State against the person of a citizen of another, who had not been served with process or voluntarily made defence, should have such faith and credit in every other State as it had in the Courts of the State in which it was rendered."

If this exposition of the law, from which your Honors have never receded, be correct, can it for a moment be contended that no new issue has been introduced into this case by service of process upon Fletcher? Let us suppose that the suit had gone to judgment without service upon Fletcher; let us suppose that a judgment had been rendered against the firm of Fletcher, Wesenberg & Co., and against the different members *in solido;* let us suppose that the record of that suit and of that judgment had been sent to Tennessee and made to serve as the basis of an action against Fletcher, would not that record have been opened to irresistible attack by Fletcher? Could he not have relied upon the decision referred to, as an impenetrable shield and defence against such judgment? And if these questions be answered in the affirmative, how can it be contended that no change has been made in the suit by plaintiffs' action in causing the service of process upon Fletcher? Before that service the issues before the Court were, the right of plaintiffs to a personal judgment against Wesenberg and to a judgment *in rem* as against any assets of the firm, and of its other members in Louisiana. After that service, the above issues remained, and there was added the issue whether or not plaintiffs had the right to a personal judgment against Jno. F. Fletcher.

We submit, then, that your Honors are called upon in this case to decide a new question, but one which we believe is clear upon principle. When Congress declared, by the Act of 1875, that a petition for removal should be filed at the term at which the cause could be first tried, it evidently meant the term at which the cause could be first tried in the form in which it has been cast by the pleadings of the parties. If a plaintiff sees fit to sue only one of several persons, upon a cause of action where he has the right so to sue, under the laws of the State where the suit is brought, and if he sees fit, at a subsequent term, to remold the suit by bringing in any other and new defendants, we submit that all of the parties to the suit have the right to remove the cause at the first term in which it assumes the new form given to it by the pleadings. That the new party would have a right to such removal, where there is a separable controversy as to him, seems to be conceded by the Judge *a quo* in his opinion, and is, indeed, hardly open to dispute. But the time within which an application to remove must be filed is the same, whether there be or be not a separable controversy. The effect of an application is the same in both cases. The only difference between the two cases is, that in the one, all parties defendant must join in the application, and in the other they need not join. In the case at bar all have joined, at the first term at which this suit could be tried, as a suit *in personam* against Jno. F. Fletcher, and we submit that the application is seasonable.

A further ground upon which the plaintiffs below moved the Court to remand the cause to the State Court was, that all of the defendants had not joined in the application for removal.

We respectfully submit, that this allegation is not sustained by the record. The only two defendants who had been served with process,—viz: John F. Fletcher and Wm. Wesenberg,—had joined in the petition to remove, and the mere fact that other defendants, who had never been served with process, did not voluntarily appear and join, would certainly not affect the rights of removal of the only parties who had been served with process.

Any other construction would enable a plaintiff at any time to defeat the right of removal by joining defendants whom, as a matter of fact, he never intended to serve and never does serve.

We respectfully submit to your Honors, that the judgment of the Court *a qua* is incorrect. But this is not the point now before your Honors.

We think we have clearly made such a case as will show you that we have the right to a regular trial and hearing of our writ of error, and that the points in this case are not so settled as to justify an affirmance of the judgment of the Court *a qua* without hearing us.

Respectfully submitted,
EDGAR H. FARRAR,
ERNEST B. KRUTTSCHNITT,
Attorneys for Plaintiffs in Error.

NEW ORLEANS, November, 16th, 1885.

116—410

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 907.

THE EUREKA LAKE AND YUBA CANAL COMPANY
(CONSOLIDATED), PLAINTIFF IN ERROR,

vs.

THE SUPERIOR COURT OF YUBA COUNTY AND PHILIP
W. KEYSER, JUDGE OF SAID COURT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 4, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 907.

THE EUREKA LAKE AND YUBA CANAL COMPANY (CONSOLIDATED), PLAINTIFF IN ERROR,

vs.

THE SUPERIOR COURT OF YUBA COUNTY AND PHILIP W. KEYSER, JUDGE OF SAID COURT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Order allowing writ of error	2	1
Writ of error	4	1
Citation	6	2
Proof of service of citation	7	2
Bonds	10	3
Petition for writ of review	16	5
Writ of review	36	12
Proof of service of writ of review	39	13
Return to writ of review	42	13
Complaint	42	13
Restraining order	78	25
Summons	80	25
Return to summons	82	26
Restraining order	83	27
Return to restraining order	84	27
Writ of injunction	85	28
Order to show cause	88	29
Affidavits on motion to vacate return	90	30
Certified copy of designation of David Cohn	99	33
Order denying motion to vacate return	103	35
Affidavit of R. H. McIlmoil	104	35
E. A. Davis	106	36

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Demurrer	110	37
Order for order to show cause	117	40
Order to show cause	118	41
Return to order to show cause	127	44
Motion to set aside order to show cause	128	44
Affidavit of J. K. Byrne	134	47
M. D. Sweeney	138	48
Orders to show cause	140	49
Letter of R. D. Carter, sheriff, to E. A. David, attorney, April 7, 1883	144	50
Orders to show cause	145	50
Affidavit of R. H. McIlmoil	150	53
E. A. Davis	154	54
Proof of service of motion to set aside	160	56
Motion to set aside order to show cause	161	57
Order denying motion to set aside	168	60
Judgment	169	60
Certificate to return to writ of review	173	61
Opinion	174	62
Judgment	175	62
Clerk's certificate	176	62

1 *Petition for Writ of Error and Order Allowing Same.*

To the Honorable Robert F. Morrison, chief justice of the supreme court of the State of California:

Now comes the "Eureka, Lake and Yuba Canal Company, Consolidated," a corporation worked and existing under and by virtue of the laws of the State of New York, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between the said corporation, plaintiff, and the Superior Court of the County of Yuba, and the Honorable Philip W. Keyser, judge of said court, defendants, number 9122, in the supreme court of the State of California, being the highest court of law or equity in said State in which decision could be had in said suit, and in which court a final judgment was rendered against the said corporation on the 12th day of January, 1885, in said suit, wherein the said corporation claimed that a certain judgment rendered against it by 2 the said superior court, imposing a fine of five hundred dollars for a contempt of said court, was so rendered without due process of law and in violation of the provisions of the Constitution of the United States, all of which appears in the record and proceedings in said suit, a manifest error had happened to the great damage of the said corporation.

Therefore the said corporation prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

W. W. COPE,
JAS. K. BYRNE,
Counsel for Plaintiff in Error.

The foregoing petition having been read and considered by me, it is ordered that the writ of error and other process therein prayed for be, and the same are hereby, allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

3 (Endorsed:) Filed Feb. 6th, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

4 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you between Eureka Lake and Yuba Canal Company, Consolidated, plaintiff in error, and Superior Court of Yuba County and Hon. Philip N. Keyser, judge of said court, defendants in error, a manifest error hath happened, to the great damage of said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the par-

ties aforesaid in this behalf, you are hereby commanded, if judgment
be therein given, that then, under your seal, distinctly and openly, you
send the record and proceedings aforesaid, with all things concerning
the same, to the Supreme Court of the United States, together
with this writ, so that you have the same at the city of Washington,
in the District of Columbia, on the second Monday of October next,
in the said United States Supreme Court to be then and there
5 held, that, the record and proceedings aforesaid be inspected,
the said Supreme Court may cause further to be done therein
to correct that error what of right and according to the law and
custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of February, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk*.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

(Endorsed:) Filed Feb. 6th, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

6 *Citation and Proof of Service.*

Citation on writ of error to the supreme court of the State of California in an action numbered 9123 on the calendar of said court.

UNITED STATES OF AMERICA, *ss:*

To the Superior Court of the County of Yuba and the Honorable Philip W. Keyser, judge of said court, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein the Eureka Lake and Yuba Canal Company, Consolidated, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of
7 the Supreme Court of the United States of America, this seventh day of February, 1885, and of the Independence of the
United States the one hundred and ninth.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, } *ss:*

Thomas E. Ryan, being duly sworn, on oath deposes and says that he is a white male citizen of the United States, and is and was at all the times hereinafter mentioned more than twenty-one years of age; that he is not a party to nor in any manner interested in the above-entitled action, wherein the Eureka Lake and Yuba Canal Company, Consolidated, is plaintiff in error, and the Superior Court of the County of Yuba and the Honorable Phil. W. Keyser, judge of said court, are defendants in error; that he personally 8 served the annexed and foregoing citation upon said defendants in error, and each of them, by delivering a true copy of said citation to J. K. Hare, Esq., clerk of said superior court of Yuba county, at Marysville, in the said county of Yuba and State of California, on the tenth day of February, 1885, and at the same time exhibiting to said Hare the annexed original citation; and by delivering a true copy of said citation to S. M. Bliss, Esq., the attorney of record in the supreme court of California, of said defendants, at Marysville, in the said county of Yuba and State of California, on the 10th day of February, 1885, and at the same time exhibiting to said Bliss the annexed original citation; and by delivering a true copy of said citation to the Honorable Philip W. Keyser, judge of said superior court of Yuba county, at Oroville, in the county of Butte and State of California, on the eleventh day of February, 1885, and at the same time exhibiting to said Keyser the annexed original citation.

THOS. E. RYAN.

Subscribed and sworn to before me this 16th day of February, 1885.

CHAS. E. KELLY,
Notary Public.

9 (Endorsed:) Filed Feb. 19th, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

10 *Bonds on Writ of Error.*

In the Supreme Court of the State of California.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Plaintiff,
vs.
THE SUPERIOR COURT OF THE COUNTY OF YUBA and the Honorable Philip W. Keyser, Judge of said Court, Defendants.
} No. 9123.

Know all men by these presents that we, Mayer Wiel and Albert W. Scholle, are held and firmly bound to the people of the State of California in the sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the ninth day of February, 1885.

Whereas the Eureka Lake and Yuba Canal Company, Consolidated, the above-named plaintiff, has prosecuted a writ of error to the Supreme Court of the United States of America to reverse 11 the judgment entered against the said plaintiff in the above-entitled action:

Now, the condition of this obligation is such that if the said Eureka Lake and Yuba Canal Company, Consolidated, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this objection shall be void; otherwise to remain in full force and effect.

ALBERT W. SCHOLLE. [SEAL.]
MAYER WEIL. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Mayer Weil and Albert W. Scholle, being first duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars exclusive of property exempt from execution and over and above all his just debts and liabilities.

ALBERT W. SCHOLLE.
MAYER WEIL.

Subscribed and sworn to before me this 9th day of February, A. D. 1885.

[SEAL.] EDWARD CHATTIN,
Notary Public.

12 I approve the foregoing bond and the sufficiency of the sureties thereto.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

(Endorsed:) Filed January 9th, 1885. J. W. McCarthy, clerk, per J. J. Williams, deputy.

13 In the Supreme Court of the State of California.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Plaintiff,
vs.
THE SUPERIOR COURT OF THE COUNTY OF YUBA and the Honorable Philip W. Keyser, Judge of said Court, Defendants.
} No. 9123.

Know all men by these presents that we, Mayer Weil and Albert W. Scholle, are held and firmly bound to The Superior Court of the County of Yuba and the Honorable Philip W. Keyser, judge of said court, the above-named defendants, in the sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the sixth day of February, 1885.

14 Whereas The Eureka Lake and Yuba Canal Company, Consolidated, the above-named plaintiff, has prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment entered against the said plaintiff in the above-entitled action:

Now, the condition of this obligation is such that if the said Eureka Lake and Yuba Canal Company, Consolidated, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

MAYER WEIL. [SEAL.]
ALBERT W. SCHOLLE. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Mayer Weil and Albert W. Scholle, being first duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars exclusive of property exempt from execution and over and above all his just debts and liabilities.

MAYER WEIL.
ALBERT W. SCHOLLE.

Subscribed and sworn to before me this 6th day of February, A. D. 1885.

[SEAL.] EDWARD CHATTIN,
Notary Public.

15 I approve the foregoing bond and the efficiency of the sureties thereto.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

(Endorsed:) Filed February 9th, 1885. J. W. McCarthy, clerk, per J. T. Williams, deputy.

16 *Petition for Writ of Review.*

In the Supreme Court of the State of California.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated,

vs.

THE SUPERIOR COURT OF THE COUNTY OF YUBA and the Hon. PHIL. W. KEYSER, the Judge thereof.

The petition of the said Eureka Lake and Yuba Canal Company, Consolidated, hereinafter styled the petitioner, respectfully shews unto the said supreme court of the State of California, and the fact is:

I.

That at each of the several times hereinafter mentioned the said petitioner was and yet is a corporation organized by the corporate name of "Eureka Lake and Yuba Canal Company Consolidated," under and by virtue of the laws of the State of New York,
17 and had and has its principal place of business in the city of New York, in the said State of New York.

II.

That the purpose for which the petitioner was organized and became and is now a corporation was and is to prosecute and carry on the business of mining in the State of California by the usual method and process of working mining property of the character of the mining property of the petitioner hereinafter described, to wit, by the process called the hydraulic process; and also the business of selling water to other corporations, associations, and individuals, to be used by them for the like purpose; and that the prosecution of mining by the hydraulic process aforesaid, and the sale of water to other corporations, associations, and persons, to be used by them in hydraulic mining, constituted at the several times herein mentioned, and now constitute, the general and ordinary and the only business of the petitioner.

III.

18 That the petitioner ever since December 29th, 1865, has been operating and working with due care and as it lawfully might, by said hydraulic process, certain mines and mining grounds, the property of the petitioner, situate in the county of Nevada, in the State of California, which could not and cannot be worked by any other than said hydraulic process, and that in the lawful and careful working of the same by the said process portions of the tailings and water resulting from said working necessarily and unavoidably flow or find their way into the tributaries of the Yuba river, upon and near which tributaries the said mines and mining grounds of the petitioner are situate.

IV.

That while the petitioner was so engaged in the lawful prosecution of its said work upon its said mining property by the said hydraulic process aforesaid, to wit, on the third day of October, 1852, an action was commenced and is yet pending and undeter-
19 mined in the said superior court of the county of Yuba against the petitioner, as sole defendant therein, by the County of Yuba, the sole plaintiff therein (and appearing therein by its district attorney in his official capacity as attorney for the plaintiff), concerning the said working of said mines by the petitioner and the necessary flowing of water and tailings caused thereby into the tributaries of the said Yuba river as aforesaid; and in and by its complaint filed on that day in the office of the clerk of the said superior court the said plaintiff prayed the court that during the pendency of

said action the petitioner might be enjoined and restrained from discharging or suffering to flow into the Yuba river or any of its tributaries any tailings or other refuse matter from its said mines or mining claims and from selling to any other corporation, association, or person any water to be used by such corporation, associa-
20 tion, or person in or about the business of hydraulic mining in
the vicinity of said Yuba river or any of its tributaries, because, as the said County of Yuba claimed in its said complaint, the said operations and works of the petitioner contributed in some degree to fill up the channel and widen the bed of the said Yuba river.

V.

That immediately upon the filing of said complaint in the office of the clerk of said superior court in and for said county of Yuba, to wit, on the third day of October, 1882, and without any notice given or attempted to be given to the petitioner or to any officer or agent of the petitioner, or to any person representing or assumed to be representing the petitioner, but, on the contrary thereof, wholly *ex parte*, an order was entered and filed in the said action, signed only by Hon. George N. Blanchard, the judge of the superior court in and for the county of Colusa, in terms enjoining and restrain-
21 ing, and purporting to enjoin and restrain, the petitioner from
depositing or suffering to flow into the channel or bed of the Yuba river, or into the channels or bed of the Middle Yuba river, or the South Yuba river, or into the tributaries, streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, and from selling to others any water to be used in hydraulic mining.

VI.

That, as the petitioner is informed and believes, no attempt to serve or pretence of service of the summons in said action or of the said order of injunction has ever been made, except that on the ninth day of October, 1882, as the petitioner is informed and believes, a copy of the complaint and summons in said action and of said order of injunction was served upon and delivered to me, David Cohn, at the city and county of San Francisco, by
22 the sheriff thereof, by one of his deputies, upon the pretence
upon the part of the plaintiff in said action that said Cohn was a managing or business agent, cashier, or secretary of the petitioner, whereas the said Cohn was not on said last-mentioned day, in point of fact, the managing or business agent of the petitioner or its cashier or secretary, nor had he occupied any such or any business relation with the petitioner within one year next theretofore, and said Cohn so informed the deputy sheriff attempting to make such service at the time, but said deputy sheriff insisted upon leaving with said Cohn, and did leave with him, a copy of said complaint and of the summons in said action and a copy of said order of injunction.

VII.

That on the seventeenth day of January, 1883, the petitioner appeared in said action, by its attorneys, James K. Byrne and William C. Belcher, Esq'rs, and filed a demurrer to the complaint therein, and said cause is now pending in said superior court
23 upon said complaint and demurrer thereto.

VIII.

That thereafter, to wit, on the second day of February, 1883, the petitioner duly appointed in writing, under its corporate seal, and made designation of A. S. Bigelow, then and yet a resident of the county of Nevada, in the State of California (that being the county in which the principal place of business of the petitioner in this State is and then was), as the person upon whom process issued against the petitioner by authority of or under any law of the State of California might be served, so as to constitute a valid service thereof on the petitioner; and thereafter, to wit, on the sixteenth day of February, 1883, the petitioner duly filed said designation in the office of the secretary of state of the State of California, where the same yet remains of record and in full force and unrevoked.

IX.

24 That thereafter, to wit, on the 23d day of April, 1883, at the city of Marysville, upon *ex-parte* application of the said plaintiff in said action then and there made to the said superior court of the county of Yuba, the said Hon. Phil. N. Keyser, the superior judge of said county of Yuba, then presiding in said superior court last aforesaid, the said superior court made and entered in the said action an order that the petitioner show cause before said superior court at the court-room thereof, in the said city of Marysville, in said county of Yuba, on the 14th day of May, 1883, at 10 o'clock a. m. of that day, why it should not be punished for a contempt of court for its refusal to obey and for its violation of the said injunction and injunction order aforesaid; that said order to show cause, after reciting in substance that it appeared to the court from certain affidavits therein referred to that the petitioner was a foreign corporation engaged in hydraulic mining in the county of Nevada, in this State,
25 and had, on the 3d day of October, 1882, been enjoined and
restrained, as in the 5th paragraph of this petition set forth, and that on the 9th day of November, 1882, the said injunction order had been served upon the petitioner, and that on the 29th day day of December, 1882, the petitioner had wilfully violated the said injunction order by depositing and suffering to flow into certain gulches, ravines, and streams tributary to the said Yuba river certain tailings from its said hydraulic mine, contained and set forth the following order and direction, to wit: "And it is further ordered that service of a copy of this order and of the affidavits herein mentioned ten days before the return day aforesaid, to wit, said 14th day of May, A. D. 1883, upon J. K. Byrne and W. C. Belcher, Esq'rs, attorneys of record herein for said defendant, shall be sufficient service of this order.

X.

That thereafter, to wit, on the 28th day of April, 1883,
26 copies of said affidavits and order to show cause were delivered to and served upon the said James K. Byrne, Esq., as one of the attorneys for the petitioner; that no service of said affidavits or of said order to show cause was ever made or attempted, except said service thereof so made upon said James K. Byrne, Esq., as aforesaid.

XI.

That the petitioner never at any time made any appearance to the said order to show cause why it should not be punished for the said alleged contempt, but by its attorneys, the said James K. Byrne, Esq., on the said 14th day of May, 1883, and before the hearing of said order to show cause, the petitioner made a special appearance before the said superior court, at the court-room thereof, for the sole purpose of objecting to the jurisdiction and authority of the said superior court, and it did then and there object before the said court, then in open session, to the jurisdiction and authority of the
27 said superior court and of the said Hon. Phil. W. Keyser, the judge thereof, at the time presiding therein, to proceed to consider or determine the alleged contempt charged against the petitioner upon the following grounds, each and all of which were then and there stated and made to appear to the said superior court and the said judge thereof, to wit:

1st. Because the said injunction order was made and entered *ex parte* and without notice to the petitioner on the said third day of October, 1882; assumed to, and did purport to restrain and suspend the general and ordinary business of the petitioner, a corporation, and was therefore not a lawful order, but that in assuming to enter the said order, without notice of the application therefor first given to the managing agent, or other proper officer of petitioner, the said superior court and the judge who made said order exceeded the jurisdiction of said court and of said judge.

28 2d. Because the said order to show cause why the petitioner should not be punished as for a contempt had not been, nor had the affidavits, or any of them, upon which said order to show cause was founded, been served upon the petitioner, nor upon its managing agent, nor its business agent, nor its cashier, nor its secretary, nor upon any officer or agent of the petitioner within the State or elsewhere.

3. Because the service of said order to show cause and of said affidavits so made upon the said James K. Byrne, Esq., one of the attorneys of record of this petitioner, was not authorized by law, and was not sufficient in law to enable the said court or said judge to hear or determine the said contempt alleged against the petitioner.

But the said superior court of the county of Yuba and the said Hon. Phil. W. Keyser, the judge thereof, upon hearing and consider-
29 ing the said several objections of the petitioner, then and there overruled the said objections of the petitioner, and each of

them, and decided and determined that the said *ex parte* order of injunction made on the said third day of October, 1882, was a lawful order entered against the petitioner and one which the petitioner was bound at its peril to obey; and further, that the service upon said James K. Byrne, Esq., in his capacity as one of the attorneys of record of the petitioner in said action, of the order to show cause why the petitioner should not be punished for a contempt as aforesaid was in law a sufficient service thereof upon the petitioner, and that the said superior court, and the said judge thereof, had thereby become and are vested with jurisdiction and authority to hear and determine the said order to show cause as upon proper service thereof upon the petitioner; and thereafter, and without the appearance of the petitioner to said order, or to any proceedings thereon, the said superior court, and the said
30 judge thereof, did, without the appearance of the petitioner
thereto, assume to and did hear and determine the said order to show cause, and did thereupon, to wit, on the said 14th day of May, 1883, upon an *ex parte* hearing of said order to show cause, adjudge, and determine that petitioner was guilty of the said contempt charged against it, and that for such its contempt it was then and there further adjudged and ordered that the petitioner should pay a fine of two hundred and fifty dollars, and which said judgment and order was then and there entered of record, and now remains of record, in said superior court, and the said court, and the judge thereof, intend to carry the said judgment and order into effect against the petitioner and its property.

That the said petitioner is advised that in entering said order of injunction, and in assuming thereafter to adjudge the petitioner guilty of contempt for its alleged violation of said order, the
31 said superior court of said county of Yuba, and the said judge
thereof, exceeded the jurisdiction thereof; and there is no appeal for the petitioner, nor has it any plain, speedy and adequate remedy in the premises.

That the real party in interest, and whose interests will be directly affected by the prosecution of this proceeding against the said Superior Court of the County of Yuba and the said Hon. Phil. W. Keyser, the judge thereof, the respondents herein, is the said County of Yuba, the plaintiff in said action pending in the said superior court as aforesaid, and entitled "County of Yuba, plaintiff, *vs.* Eureka Lake and Yuba Canal Company, Consolidated."

The petitioner prays that this its petition be filed of record in this honorable court, and that upon consideration thereof this honorable court order that a writ, attested in the usual form and under its proper seal, be issued by the clerk, directed to and commanding the said Superior Court of the said County of Yuba and the
32 Hon. Phil. W. Keyser, the judge thereof, that the said court
and its said judge do desist until the further order of this honorable court from in any way proceeding to enforce or carry into effect the said order and judgment lately entered in said superior court, whereby it was in effect adjudged and determined that the said petitioner had been and was guilty of a contempt of said

superior court in its alleged disobedience to the said order of injunction theretofore, to wit, on the third day of October, 1882, entered in said court in the action therein depending and entitled "County of Yuba, plaintiff, *vs.* Eureka Lake and Yuba Canal Company, Consolidated, defendant;" and further directing and commanding the said Superior Court of the County of Yuba and the said Hon. Phil. W. Keyser, judge thereof, that they do, within thirty days next hence ensuing, return to this court and cause to be filed in the office of the clerk thereof a true copy of the record in the 33 said action now in said superior court depending, and therein entitled as aforesaid, and certified in due form under the seal of said superior court and by the clerk thereof.

And that upon the filing in this court of the said copy of the record of said action, and upon inspection thereof, it is then adjudged and determined by this honorable court that the said proceedings of said superior court, and of the said judge thereof in the premises, were and are in excess of jurisdiction of said court and judge; that the said superior court and the judge thereof be prohibited from any other or further proceeding thereon against the petitioner, and that all and singular the said proceedings of said superior court, and of said judge in the premises be annulled and adjudged void, and for such other order and judgment for the relief of the petitioner as may be proper.

W. C. BELCHER,
J. H. BYRNE,
Att'ys for Petitioner.

S. M. WILSON,
WM. T. WALLACE,
Of Counsel.

34 STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

James K. Byrne, being duly sworn, states upon oath that he is one of the attorneys of record of the petitioner within named, defendant in the said action in the petition mentioned, wherein the county of Yuba is plaintiff and the petitioner is the defendant; that the said petitioner is a foreign corporation, and therefore unable to verify the said petition, and that the facts stated in the said petition are within the knowledge of this affiant; that the said petition is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

JAS. K. BYRNE.

Sworn and subscribed this 25th day of July, 1883, before me—
[SEAL.] LEWIS B. HARRIS,
Notary Public.

35 (Endorsed:) Filed July 26th, 1883. J. W. McCarthy, clerk, per J. T. Williams, deputy.

36 *Writ of Review and Proof of Service.*

In the Supreme Court of the State of California.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated,
vs.
THE SUPERIOR COURT IN AND FOR THE COUNTY OF YUBA and the Hon. PHIL. W. KEYSER, Judge of said Superior Court.

The people of the State of California to the Superior Court of the County of Yuba and the Honorable Phil. W. Keyser, the judge thereof, Greeting:

Whereas it has been made manifest to our supreme court by the petition of "Eureka Lake and Yuba Canal Company, Consolidated," a corporation organized under and by virtue of the laws of the State of New York, the party beneficially interested, duly verified, that in a certain action pending before you against the said corporation, the petitioner, at the suit of the county of Yuba,
37 you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal, nor any other plain, speedy, or adequate remedy, and being, therefore, willing to be certified of the said action and proceedings:

We, therefore, command you that you certify and send to our supreme court of the State of California, at San Francisco, at or before the expiration of thirty days from the date hereof, to wit, on the 25th day of August, 1883, the record now remaining before you in the cause wherein the said County of Yuba is the plaintiff, and the said petitioner is the defendant, including a certain order of injunction entered therein on the 3d day of October, 1882, and an order entered therein on the 14th day of May, 1883, adjudging the said petitioner guilty of contempt and imposing upon said petitioner a fine of two hundred and fifty dollars, and all affidavits, papers, and other proceedings and files in anywise touching or concerning the said order of injunction, or the said order adjudg-
38 ing the petitioner guilty of contempt as aforesaid, as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our said supreme court, and that our said supreme court may further cause to be done thereupon what it may appear of right ought to be done, and in the meantime we command and require the said superior court of the county of Yuba and the Hon. Phil. K. Keyser, the judge thereof, to desist from further proceedings in the matter so to be reviewed, to wit, the said order of May 14th, 1883.

Witness the Hon. R. F. Morrison, chief justice of our supreme court, at the court-room, in the city of San Francisco, this 26th day of Jan'y, A. D. 1883.

J. W. McCARTHY, *Clerk*,
[SEAL.] By J. S. WILLIAMS, *Deputy Clerk*.

39 City and County of San Francisco, State of California, } ss:

In the Supreme Court of the State of California.

Eureka Lake and Yuba Canal Co., Consolidated,
vs.
The Superior Court of the County of Yuba and the Hon. Phil. W. Keyser, the Judge thereof.

Henry C. Newberry, being first duly sworn, deposes and says that he is, and was on the 27th day of July, 1883, a person over the age of 21 years, and not a party to the above-entitled proceeding; that on the 27th day of July, 1883, he personally served the annexed writ of review in the above-entitled proceeding on the Superior Court of the County of Yuba, State of California, by delivering to and leaving with the Hon. Philip W. Keyser personally, the judge of 40 the said superior court of the county of Yuba, at Yuba City, Sutter county, State of California, a true copy of the said writ of review, together with and attached to a true copy of the petition for writ of review in the above-entitled proceeding.

Affiant further says that on the said 27th day of July, 1883, he personally served the annexed writ of review in the above-entitled proceeding on the County of Yuba, a municipal corporation, whose interests may be affected by the above-entitled proceeding, by delivering to and leaving with J. T Flatham personally, the president of the board of supervisors of the county of Yuba, at the city of Maysville, county of Yuba, State of California, a true copy of said writ of review, together with and attached to a true copy of the petition for writ of review in the above-entitled proceeding.

HENRY C. NEWBERRY.

Subscribed and sworn to this 27th day of August, 1883, before me—
[SEAL.] HOLLAND SMITH,
Notary Public.

41 (Endorsed:) Filed August 27, 1883. J. W. McCarthy, clerk, per J. S. Williams, deputy.

42 *Return to Writ of Review. Complaint.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba, Plaintiff,
vs.
Eureka Lake and Yuba Canal Co., Consolidated, Defendants. } No. —.

Now comes the County of Yuba, of the State of California, by its attorneys, and complains of the defendant, Eureka Lake and Yuba Canal Company, Consolidated, and, for first cause of action, alleges that plaintiff now is, and continuously since the 18th day of Febru-

ary, A. D. 1850, has been, a body politic and corporate under
43 the name of the County of Yuba, and, among others, has
been and still is vested by law with the following powers:

1st. To sue and be sued.

2d. To purchase and hold lands within its limits.

3d. To make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers.

4th. To make such orders for the disposition or use of its property as the interests of its inhabitants require.

5th. To levy and collect taxes.

6th. To lay out, maintain, control, and manage public roads, turnpikes, ferries, and bridges within the county, and to levy taxes therefor.

7th. To erect and furnish a court-house, jail, hospital, and such other public buildings as may be necessary.

44 8th. To preserve, take care of, manage, and control all real and personal property belonging to the county.

9th. To grant licenses and franchises for constructing, keeping, and taking tolls on roads, bridges, and ferries.

II.

That the defendant, as plaintiff is informed and believes, is a corporation organized under and by virtue of the laws of the State of New York for the purpose, among others, of mining and acquiring water rights and water for mining purposes, and as such is now doing business in this State.

III.

That plaintiff now is, and ever since the — day of ——, A. D. 1855,
has been the owner and in possession of all those certain lots, tracts,
or parcels of land situate in the city of Marysville, in said county,
known and designated upon the map of said city as recorded in the
office of the county recorder of said county as follows, to wit:
45 lot four (4) of block six (6) in range letter "D," and the north
half of lot three (3) of block six (6) in range letter "D," and
also that certain lot or parcel of land situate in said county known
and designated upon the said recorded map of said city as lot one
(1) of block fourteen (14) in range letter "H."

That upon said lot four plaintiff has heretofore erected its court-house, at a cost of about $50,000; that upon said north half of lot three the plaintiff has erected its county jail, at a cost of about $10,000, and has also erected thereupon a sheriff's residence at a cost of about $10,000, and upon said lot one has erected its county hospital at a cost of about $15,000.

That ever since the erection and furnishing of said public buildings above named the plaintiff has used and maintained, and still does use and maintain, the same for county purposes.

IV.

That hydraulic mining, as now practiced and understood, 46 is a mode or process of mining for gold by which high banks of earth and gravel, usually composed of streaks containing gold enough to pay for the washing and streaks which do not—the latter in cubic contents largely predominating—are washed and removed from their natural position, after being shaken up and shattered by means of immense blasts of powder, into sluiceways and flumes, and thence into the natural water courses and rivers, by means of large streams of water forced through iron pipes and thence discharged from nozzles attached to said pipes with great force and velocity against the said banks of earth and gravel by a heavy water pressure of from one hundred to five hundred feet in height, the gold being separated from the earth, sand, and gravel by the action of the water, and retained in the pavements of said sluiceways and flumes, whilst the refuse matter, consisting of boulders, cobble-stones, pebbles, sand, and clay, generally called and 47 known as "tailings," or "debris from the mines," is washed into and down said natural water courses and rivers and deposited in the beds and channels thereof throughout their entire length, the heavier portion thereof being first deposited and lodged in the upper portions of said water courses and rivers, whilst the lighter portions thereof are carried further down and deposited in the lower portions of said rivers. This mining by the hydraulic process has been practiced and carried on to some extent in the mountainous parts of the State of California during the last twenty years. It attained great dimensions about the year 1876, and at the present time is carried on extensively, principally in the counties of Butte, Yuba, Sierra Nevada, and Placer, and on a much smaller scale in some of the other counties, and in the hilly parts of a few of the valley counties of California lying to the east of the Sacramento river. The tailings from a part of the hydraulic mines worked in Nevada county and the tailings from most of those worked 48 in Yuba and Sierra counties are discharged into the Yuba river and into streams tributary thereto, and have been deposited in the bed and channel of the Yuba river throughout its entire length below what is called the hydraulic mining belt on said river.

V.

That the Yuba river is a living stream heading in the western summit of the Sierra Nevada mountains, and pursues through deep defiles and canyons a westerly course until it reaches the eastern margin of the Sacremento Valley, where it debouches into that valley at the place called Sand Flat and crosses it on the same general course, and finally empties into the Feather river at or near the city of Marysville, about 15½ miles, following the meanders of said river from the said Sand Flat; that said river, up to the time when said process of hydraulic mining was begun along and upon it, 49 was a stream of clear water, and in crossing said portion of the Sacremento Valley ran in a well-defined channel between

natural banks sufficiently high to confine its waters and protect the
lands adjacent to and upon its margin from overflows and from
damage by its flood waters; that the grade of the Yuba river and of
its aforesaid tributaries, from the dumps of the hydraulic mines on
its headwaters to where said river debouches into the Sacramento
Valley, exceeds fifty feet to the mile, but from there to its mouth its
grade is much less, varying from five to twenty feet to the mile, and
the greatest part of the tailings and debris from the aforesaid
hydraulic mining operations in its headwaters have been and now are
swept and carried by the force of the water in said stream and tributaries
and such waters as are used in said mining operations down and
through the said defiles and canyons of said river and into the Sacramento
Valley; that the deposits of mining tailing and debris
50 as aforesaid, in the headwaters of said river, have increased
the grade of the stream and made it more uniform and made
the bottom thereof smoother by filling the deep holes therein, and
thereby has facilitated the downward flow of such tailings and debris
through the mountain course of said river; that from the place of
debouchment of said river aforesaid into the valley aforesaid, down
to the mouth of said river, owing the great reduction in the grade
of said stream, a large portion of the slickens, sand, clay, and small
stones from the hydraulic mines aforesaid, instead of passing through
the channel of that river into Feather river, has choked and filled
its channel and overflowed its banks and the adjacent land with
said mining debris and tailings, and caused it to form new channels
in the valley, which in time were choked and filled up with such
debris and tailings, and new channels thereupon were formed
51 at random in said valley, in which the waters and said debris
and tailings of said river ran, and these, in their turn, became
filled and were succeeded by other channels for said water to move in.

VI.

And plaintiff, on its information and belief, avers that said defendant
is the owner and in possession of certain mining claims and
property and water and water rights situated in the county of Nevada,
in said State of California; that said mining claims and property are
located in the northwestern portion of said county, near to the Middle
and South Yuba rivers—both tributary to the main Yuba river—a
portain of said claims being situated about four miles above Moore's
Flat, on the left slope of the Middle Yuba river; another portion
near to and southwesterly from Columbia Hill on the right slope
of the South Yuba river, and another portion on the divide between
the South and the Middle Yuba at a point about
52 1½ miles south of North San Juan and one-half mile northeast
from Sweetland, and contains in the aggregate about
1,000 acres of land, more or less; that said mining claims are susceptible
of being worked and mined to a depth varying from 175
feet to 350 feet below the surface, and to such depth are composed of
various strata of red earth, pipe clay, sand, gravel, small stones, cobbles,
and boulders, the greater part of which, except the pipe clay,
contains small particles of gold; that by means of ditches and iron

pipes said defendant has conducted to its tracts of mineral grounds
or mines large supplies of water, to wit, an aggregate of 6,000
miners' inches, which it is now using and will continue to use, under
a verticle pressure of more than 200 feet, to mine its said tracts of
land by the hydraulic process, as hereinabove described, discharging
water through Monitors and Little Giants from nozzles vary-
53 ing in size from 5 inches to 11 inches in diameter, and dump-
ing the tailings from a portion of its said mining ground into
the said Middle Yuba river, and from another portion of said mining
ground into the west branch of Spring creek, a short canyon lead-
ing into the said South Yuba river, whence they are carried and
transported into said Yuba river; that said defendant has been
mining its said tracts of mineral lands for several years immedi-
ately last past by the mode and process aforesaid, and is now con-
tinuously, day after day, discharging and dumping into said Middle
Yuba river and said creek, and thence into the Yuba river as afore-
said, a large quantity of solid material from its said mines, to wit,
about 12,000 cubic yards, said solid material being composed of
cobble-stones, gravel, sand, clay, and boulders; that its yearly
54 discharge of tailings from its said mines into the beds and
channels of said streams have been at least 4,000,000 cubic
yards, and will continue to be that quantity annually unless re-
strained, and at such rate it will require over twenty years to mine
out and exhaust said tracts of mineral lands.

And plaintiff further shows that it is informed and believes that said defendant, by its agents, has declared its intentions, and really intends to continue to mine its said tracts of mineral lands in the manner and at the rate aforesaid, and to discharge and dump the tailings of such mining ground into said stream as aforesaid until said tract of land shall be mined out and exhausted; and that it will so continue to mine and to discharge and to dump said tailings as aforesaid, unless enjoined and restrained by the order of this honorable court.

That the tailings discharged and dumped into the said
55 creek and said Middle and South Yuba rivers by said defend-
ant as aforesaid have been, now are, and will continue to be
washed and removed down said creek and said other streams by the
natural force of the water into said Yuba river, and thence have
been, now are, and will continue to be washed and removed down
said river by the natural force of the waters thereof, and commin-
gling with the tailings from other hydraulic mines, and with them
have been and will continue to be deposited and lodged in the bed
and channel of the Yuba river and upon the lands adjacent thereto;
that since defendant commenced to mine its said tracts of land afore-
said the bed and channel of said Yuba river below defendant's said
dumping places have been and continue to be raised up, widened,
and shallowed by the deposits therein of tailings from defendant's
said mines and other hydraulic mines, as aforesaid, to a much
56 greater extent than at any time before and by reason thereof;
the natural flow and escape of the waters of said Yuba river
have been greatly impeded and obstructed, and the lands adjacent

thereto have been overflowed and injured to a much greater extent than at any time before the commencement of such mining by said defendant, and that by such mining and discharge of tailings into said creek and said Middle and South Yuba rivers and into Yuba river by said defendant as aforesaid said defendant has largely and materially added and contributed to the said filling up, raising, widening, and shallowing of the bed and channel of said Yuba river, and to the obstruction of the natural flow and escape of the waters of said river.

VII.

That there are many mines other than the defendant's worked by
the hydraulic process, as aforesaid, located upon and adjacent
57 to said Yuba river and its various tributaries, the tailings
from which are also washed into and down the beds and
channels of said stream; and plaintiff further alleges that the power and force of the water of said Yuba river to scour out and carry off the tailings from the said hydraulic mines deposited in the beds and channels of said river, as aforesaid, are proportioned to the depth and purity of water flowing in said bed and channel, and between the banks of said river.

That the greater the depth and purity of the water so flowing the greater is its force and power to scour and carry off said deposits, while such force and power decrease in proportion to the diminution of the depth of the water so flowing in said river bed and channel, and to the extent that said water is surcharged with earthy matter.

That the original bed and channel of the said Middle Yuba
58 and South Yuba, from the place where defendant dumps the
tailings from its mines, as aforesaid, down to the Yuba river,
and thence down to the mouth of said Yuba river, have already become choked, filled up, and destroyed by the tailings from said hydraulic mines, including those of defendant; that in consequence of the said filling up of said river the surface of the present bed of said Yuba river is higher than the original banks of said stream, in consequence whereof the depth of water of said river has been greatly diminished, especially during the high stages of the water of said river, when said water overflows the banks of said river and spreads over large tracts of land on each side thereof, carrying with it large quantities of said tailings and mining debris, which are deposited on said lands, instead of said water being confined within the natural banks of said river, as it would be but for said de-
posits therein from said hydraulic mines; that by reason
59 of the diminution of the depth of the waters of said river, and
the surcharging of said water with said debris, and the filling
up of the original bed and channel of said river as aforesaid, the present bed and channel of said river will fill up and be destroyed much more rapidly in proportion to the quantity of said hydrantic tailings deposited therein than did said original bed and channel when the waters of said river had greater depth and purity, and consequently more power to scour out and carry off said deposit.

That, as plaintiff is informed and believes, a continuance of the deposits of such tailings from said hydraulic mines, including those of defendant, during the next two years, at one-half the rate they have been deposited during the last two years, will fill up and destroy the present bed and channel of said Yuba river, and overflow,
60 submerge, and destroy the said property of plaintiff, and will
cover up the same to a great depth with deposits of said tailings and mining debris, and will weaken the walls of the said buildings erected thereon, and cause the same to crumble and fall, and render said buildings wholly useless and unfit for human occupancy or any other purpose whatever.

That the value of plaintiff's said property, by the reason of the aforesaid acts of said hydraulic miners, including said defendant, and the threatened dangers arising as aforesaid from said acts, has already depreciated more than fifty per cent., and will still further depreciate unless said acts are restrained.

VIII.

Plaintiff further alleges, upon its information and belief, that if said hydraulic mining by said defendant and others is stopped and not again resumed the waters of said river will at once commence
61 to scour out and carry off the tailings heretofore deposited
therein as aforesaid, and within a few years will thereby restore said river to its former and normal condition, and the plaintiff's said property will thereby be freed from the danger threatened and impending over it as aforesaid.

IX.

And said plaintiff, upon its information and belief, avers that said defendant threatens to and will, unless restrained by order of the honorable court, sell to others and suffer and permit others to use, for the purpose of mining by the hydraulic process above described, a portion of the water acquired and owned by it for mining and other purposes, and that the tailings from the mines of such others by whom said water will be so used will be dumped and deposited in the said Yuba river and its tributaries, and will thereby materially contribute to the dangers threatened and hereinbefore complained of.

62 And for a second cause of action plaintiff alleges:

I.

That plaintiff now is, and continuously since the 18th day of February, 1850, has been, a body politic and corporate under the name of the County of Yuba, invested, among others, with the power set out and enumerated in the paragraph 1 of the first cause of this complaint, which said paragraph is hereby referred to and made a part thereof.

II.

That the defendant, as plaintiff is informed and believes, is a corporation organized under and by virtue of the laws of the State of

New York for the purpose, among others, of mining and acquiring water rights and water for mining purposes, and as such is now doing business in this State.

III.

Plaintiff alleges that by an act of the Legislature of the 63 State of California, entitled "An act to authorize the board of supervisors of Yuba county to construct a bridge across the Yuba river and roads connecting the same with the highlands," approved March 10th, 1868, and the amendments thereto, the said plaintiff herein was granted the right and privilege, and it was made the duty of said plaintiff, to construct and maintain a bridge across said river and roads connecting the same with the highlands, at a point to be selected by the said board of supervisors, within three miles of the city limits of the city of Marysville; that under and pursuant to the said act of Legislature and of an act amendatory thereof, entitled "An act to amend an act entitled an act to authorize the board of supervisors of Yuba county to construct a bridge across the Yuba river and roads connecting the same with the highlands," approved March 10th, 1868, and which said amendatory act was 64 approved March 28th, 1872, said board of *of* supervisors of county of Yuba did, by an order duly made and given, determine and locate a site for said bridge, which said site so located is described as follows:

Beginning at the foot of "D" street, in the city of Marysville, in said county, on the right bank of said Yuba river, and extending thence south 6 degrees east 1,500 feet across and to a point beyond the left bank of said river.

IV.

That thereafter, to wit, during the year 1872, the said plaintiff, at a great outlay, to wit, an outlay of $100,000.00, did erect and construct on the site aforesaid, across said Yuba river, a bridge 1,500 feet long and 20 feet wide, and also roads connecting said bridge with the highlands, and ever since has, and now does, maintain the same for public use; that said bridge was so erected for the use, and ever since has been used, for the passage of foot passengers, live 65 stock of every kind, and vehicles of every description; that said bridge and roads connecting the same with the highlands, is the only highway across said river between its mouth and the point where it debouches into the valley, except the railroad, by which persons, live stock, and vehicles can pass from that portion of said county lying north of the Yuba river to that portion thereof lying south of said river.

That the said bridge and the roads connecting the same with the highlands are a public highway.

That said plaintiff is responsible for providing and keeping passable and in good repair the bridges on all public highways within its territory.

V.

Plaintiff hereby refers to the paragraphs of the first count of this complaint, marked respectively IV and V, and makes the same and each and every allegation thereof a part hereof.

VI.

66 And said plaintiff, upon its information and belief, avers that said defendant is the owner and in possession of certain mining claims and property situated in the county of Nevada, in said State of California; that said mining claims and property are located in the northwestern portion of said county, near to the Middle and the South Yuba rivers, both tributary to the main Yuba river, a portion of said claims being situated about four miles above Moore's Flat, on the left slope of the Middle Yuba river; another portion near to and southwesterly from Columbia Hill, on the right slope of the South Yuba river; and another portion on the divide between the South and the Middle Yuba at a point about one-and-a-half miles south of North San Juan, and one-half mile northeast from Sweetland, and contains in the aggregate about 1,000 acres of land, more or less.

That said mining claims are susceptible of being worked
67 and mined to a depth varying from 175 to 350 feet below the surface, and to such depth are composed of the various strata of red earth, pipe-clay, sand, gravel, small stones, cobbles, and boulders, the greater part of which, except the pipe-clay, contains small particles of gold; that by means of ditches and iron pipes said defendant had conducted to its said tracts of mineral ground or mines large supplies of water, to wit, an aggregate of 6,000 miner's inches, which it is now using and will continue to use, under a vertical pressure of more than 200 feet, to mine its said tract of land by the hydraulic process, as hereinabove described, discharging water through Monitors and Little Giants from nozzles varying in size from 5 inches to 11 inches in diameter, and dumping the tailings from a portion of its said mining ground into the said Middle Yuba river, and from another portion of said mining ground into the west branch of Spring creek, a short canyon leading
68 into the said South Yuba river, whence they are carried and transported into said Yuba river; that said defendant has been mining its said tracts of mineral lands for several years immediately last past by the mode and process aforesaid, and is now continuously, day after day, discharging and dumping into said Middle Yuba river and said creek, and thence into the Yuba river, as aforesaid, a large quantity of solid material from its said mines, to wit, about 12,000 yards of solid material, being composed of cobblestones, gravel, sand, clay, and boulders; that its yearly discharge of tailings from its said mines into the beds and channels of said streams, gulches, and ravines has been at least 4,000,000 cubic yards, and will continue to be that quantity annually unless restrained, and — such rate it will require over six years to mine out and exhaust said tracts of mineral land.

And plaintiff further shows that it is informed and believes that
said defendant, by its agents, has declared its intentions, and really
intends, to continue to mine its said tracts of mineral lands
69 in the manner and at the rate aforesaid, and to discharge and
dump the tailings of such mining ground into said streams,
gulches, and ravines as aforesaid, until said tracts of land shall be
mined out and exhausted, and that it will so continue to mine and
to discharge and to dump said tailings, as aforesaid, unless enjoined and restrained by the order of this honorable court.

That the tailings discharged and dumped into the said creek and
said Middle and South Yuba rivers by said defendant, as aforesaid,
have been, now are, and will continue to be washed and removed
down said creek and said other streams by the natural force of the
water into said Yuba river, and thence have been, now are, and will
continue to be washed and removed down said river by the natural
force of the waters thereof and commingled with the tailings from
other hydraulic mines, and with them have been, and will
70 continue to be, deposited and lodged in the bed and channel
of the Yuba river, and upon the lands adjacent thereto; that
since defendant commenced to mine its said tracts of land aforesaid
the bed and channel of said Yuba river, below defendant's said
dumping places, have been and continue to be raised up, widened,
and shallowed by the deposits therein of tailings from defendant's
said mines and other hydraulic mines as aforesaid to a much greater
extent than at any time before, and by reason thereof the natural
flow and escape of the waters of said Yuba river have been greatly
impeded and obstructed; and that, by such mining and discharge of
tailings into said creek and said Middle and South Yuba rivers and
into said Yuba river by said defendant as aforesaid, said defendant
has largely and materially contributed and added to the said filling
up, raising, widening, and shallowing of the bed and channel of
said Yuba river, and to the said obstruction of the natural
71 flow and escape of the water of said river.

VII.

That there are many mines other than defendant's worked by the
hydraulic process as aforesaid located upon and adjacent to said
Yuba river, and its various tributaries, the tailings from which are
also washed into and down the beds and channels of said river and
its tributaries; and plaintiff further alleges that the power and force
of the water of said Yuba river to scour out and carry off the tailings from the said hydraulic mines deposited in the bed and channel of said river as aforesaid are proportioned to the depth and
purity of the water flowing in said bed and channel and between
the banks of said river; that the greater the depth and purity of the
water so flowing the greater is its force and power to scour out and
carry off said deposit, while such force and power decrease in proportion to the diminution of the depth of the water so flowing in
said river bed and channel, and to the extent that said water
72 is surcharged with earthy matters; that the original bed
and channel of the said Middle Yuba and South Yuba, from

the places where the defendant dumps the tailings from its mines
as aforesaid down to the Yuba river, and thence down to the mouth
of said Yuba river, have already become choked, filled up, and
destroyed by the tailings from said hydraulic mines, including
those of said defendant; that in consequence of said filling up of
said river the surface of the present bed of said portion of said river
is higher than the original banks of said river; that when said
bridge was erected the floor thereof was about 17½ feet above the
then bed of said river and about 9¼ feet above the then high-water
mark of said river; that by reason of the deposits of said mining
debris and tailings in the said river by said hydraulic mines, including said defendant, the bed of said river beneath said bridge
has been greatly raised, and the high-water mark of said river has
already been raised as high as the floor of said bridge, and
73 in places, in time of flood, the water of said river has actually
flowed over and upon the floor of said bridge and deposited
drift and other material thereon; that by reason of said filling of
said river, and the overflow of the waters thereof, caused as aforesaid,
the road connecting the southern end of said bridge with the high
land on the left or southern bank of said river has already been
washed away in three places, said gaps so washed out varying in length
from 350 feet to 1,150 feet, which plaintiff has been compelled to repair,
and has repaired, at great expense, to wit, at an outlay of $34,000,
by erecting in said breaches bridges and trestle-work, which it has
ever since maintained and does now maintain and keep in repair.

That the acts aforesaid of said defendant have largely and materially contributed to the raising of said bed and high-water mark of said river.

74 That said plaintiff is informed and believes that the defendant will continue its said acts, unless restrained by this honorable court, and that by reason of said acts and the consequent raising of the bed and high-water mark of said river the said bridge and its approaches, and the roads connecting the same with the highlands, will be washed away and destroyed, and said plaintiff wholly prevented from keeping the same passable and in good repair.

VIII.

And plaintiff further alleges, upon its information and belief, that if said hydraulic mining by said defendant and others is stopped and not again resumed the waters of said river will at once commence to scour out and carry off the tailings heretofore deposited therein as aforesaid, and will thereby restore said river to its former and normal condition and relieve said bridge and the said roads connecting the same with the highlands from the said danger which now threatens their destruction, and will permit the plaintiff to keep the same passable and in good repair.

IX.

75 And said plaintiff, upon its information and belief, avers that said defendant threatens to, and will, unless restrained

by the order of this honorable court, sell to others, and suffer and permit others to use for the purpose of mining by the hydraulic process above described, a portion of the water acquired and owned by it for mining and other purposes, and that the tailings from the mines of such others by whom said water will be so used will be dumped and deposited in the said Yuba river and its tributaries, and will thereby materially contribute to the danger threatened and heretofore complained of.

Wherefore the plaintiff prays that during the pendency of this action the said defendant, and all and each of its officers, agents, superintendents, managers, servants, and employés may be enjoined and restrained from discharging or dumping into Yuba river, into any stream, gulch, or ravine tributary thereto, and especially the Middle Yuba river, Spring creek, and the South Yuba river, 76 and also from causing or suffering to flow into said river any tailings, boulders, cobble-stones, gravel, sand, clay, debris, or refuse matter from its said tracts or claims of mineral land, mines, or elsewhere, and also from selling to others, or suffering or permitting others to use, its water supply hereinbefore described, or any part thereof, for the purpose of washing by the hydraulic process, the banks of or bottoms of any other mine or other mining ground into the beds or channels of Yuba river, or any stream, gulch, or ravine tributary thereto, and that, upon the final hearing and trial of this action, the said defendant may be so as aforesaid enjoined and restrained perpetually, and that plaintiff recover its costs of suit herein.

B. W. HOWSER,
District Attorney of Yuba County, and Attorney for Plaintiff.

STABLER & BAYNE AND
EDWIN A. DAVIS,
Of Counsel.

77 STATE OF CALIFORNIA, } ss:
County of Yuba, }

A. S. Wight, being first duly sworn, on his oath says that he is chairman of the board of supervisors of said Yuba county; that he has heard the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

A. S. WIGHT.

Subscribed and sworn to before me this 3d day of October, A. D. 1882.

[Seal Superior Court Yuba County, Cal.]

T. J. SHERWOOD, *Clerk,*
By E. E. MEEK, *Deputy Clerk.*

Filed 3d October, 1882.

T. J. SHERWOOD, *Clerk,*
By E. E. MEEK, *Deputy Clerk.*

Filed August 21st, 1883.

J. W. McCARTHY, *Clerk,*
By FRANK MYERS, *Deputy.*

78 *Minutes of Court.*

In the Superior Court in and for the County of Yuba, State of California.

TUESDAY, *October 3d*, 1882.

The court met as usual, and there were present Hon. George A. Blanchard, judge of the superior court of Colusa county, presiding at the request of Hon. Phil. W. Keyser, judge of the superior courts of Yuba and Sutter counties; W. L. McCoy, sheriff, and T. J. Sherwood, clerk.

Whereupon the following proceedings were had.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

It appearing to the court from the duly verified and filed complaint of the plaintiff in the above-entitled cause that the plaintiff is entitled to an order restraining the defendant from the commission of the acts in said complaint complained of:

It is, therefore, ordered and adjudged that the defendant, Eureka
Lake and Yuba Canal Company, Consolidated, and its
79 officers, agents, superintendents, managers, servants, and em-
ployes, and each of them, be enjoined and restrained until the further order of this court from depositing in or suffering to flow into the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river, or the South Yuba river, or into the tributary streams, gulches or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris," and also from selling to others or suffering or permitting others to use any portions of the water acquired or owned by it for mining or other purposes, for the purpose of washing by the hydraulic process the banks or bottoms of any other mine or other mining ground, into the beds or channels of the Yuba river, or any stream, gulch, or ravine tributary thereto, and that a writ of injunction issue accordingly.

(Done in open court this third day of October, 1882.)

80 *Summons.*

In the Superior Court in and for the County of Yuba, State of California.

The people of the State of California to Eureka Lake and Yuba Canal Company, Consolidated, Greeting:

You are hereby summoned to appear in an action commenced against you as defendant by the County of Yuba as plaintiff in the superior court in and for the county of Yuba, State of California, and answer the complaint therein of said plaintiff in said court filed against you within ten days after service upon you of this summons, exclusive of the day of service, if served on you in this county, or

within thirty days after such service exclusive of the day of service if served elsewhere. Said action is brought to enjoin you and restrain you during the pendency hereof, and also to enjoin and restrain you perpetually upon the trial thereof from depositing and causing to be deposited the tailings and debris from your several mining claims and property in the county of Nevada into the bed and channel of the Yuba river, or any stream, gulch, or ravine tributary thereto, or from suffering said tailings and debris to flow into said river, or any stream, gulch, or ravine tributary thereto, and also from selling to others, or suffering or permitting others
81 to use your water supply mentioned in said complaint, or any part thereof, for the purpose of washing by the hydraulic process the banks or bottom of any other mine or other mining ground into the beds or channels of Yuba river, or any stream, gulch, or ravine tributary thereto.

The cause of said action is that by depositing such tailings and debris in the beds and channels of said river and its tributary streams, gulches, and ravines you have largely and materially contributed to the filling up of said bed and channel of said river, causing its said bed to be raised up and said channel to be widened and shallowed, and thereby impeding and obstructing the natural flow and escape of the waters of said river, and causing them to overflow the banks of said river and spread over large tracts [of] plaintiff's territory, and to rise in times of high water to a much greater height than they otherwise would do; that by reason thereof the real property of plaintiff has greatly depreciated in value, and certain of its bridges and highways have been materially injured; that you threaten and intend to continue you- said acts complained of and to do the things threatened as aforesaid, and that a further continuance thereof and of the same acts by others will still further depreciate the value of said property, and cause great and irrep-
82 arable injury to said bridges and highways, and in a short time cause the total destruction of said property and wholly prevent plaintiff from keeping said bridges and highways in repair and condition for public use, and you are hereby notified that if you fail to appear and answer the said complaint as directed the plaintiff will apply to the court for the relief demanded in its said complaint.

Given under my hand and the seal of the superior court of the county of Yuba, State of California, this 3d day of October, A. D. 1883.

[SEAL.]

T. J. SHERWOOD, *Clerk*,
By E. E. MEEK, *Deputy Clerk*.

OFFICE OF THE SHERIFF OF THE
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on the 9th day of November, A. D. 1882, and personally served the same, on the 9th day of November, A. D. 1882, upon Euraka Lake and Yuba Canal Company, Consolidated, a foreign corporation, the therein-named defendant, by delivering to David Cahn, the person designated by said defendant upon whom process may be served, personally, in the city and county of San Francisco, a copy of said summons, together with a certified copy of the complaint in said action therein named.

Dated at San Francisco this 9th day of November, 1882.

JOHN SEDGEWICK, *Sheriff*,
By HENRY GILLS, *Deputy Sheriff*.

(Endorsed:) Filed 29th Nov., 1882. T. J. Sherwood, clerk, by E. E. Meek, deputy.

83 *Restraining Order.*

STATE OF CALIFORNIA, COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

It appearing to the court from the duly verified and filed complaint of the plaintiff in the above-entitled cause that the plaintiff is entitled to an order restraining the defendant from the commission of the acts in said complaint complained of:

It is, therefore, ordered and adjudged that the defendant, Eureka Lake and Yuba Canal Company, Consolidated, and its officers, agents, superintendents, managers, servants, and employés, and each of them, be enjoined and restrained, until the further order of this court, from depositing in, or suffering to flow into, the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris," and also from selling to others, or suffering or permitting others to use, any portion of the water acquired or 84 owned by it for mining or other purposes, for the purpose of washing by the hydraulic process the banks or bottoms of any other mines or other mining ground into the beds or channels of the Yuba river or any stream, gulch, or ravine tributary thereto; and that a writ of injunction issue accordingly.

Done in open court this third day of October, A. D. 1882.

GEO. A. BLANCHARD,
Superior Judge, Presiding.

(Endorsed:) Restraining order. Filed 3d Oct., 1882. T. J. Sherwood, clerk, by E. E. Meek, deputy clerk.

A copy of the foregoing order was served upon the defendant, as appears by the following return:

SHERIFF'S OFFICE,
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed certified copy of restraining order on the 9th day of November, A. D. 1882, and 85 personally served the same on the 9th day of November, A. D. 1882, upon "Eureka Lake and Yuba Canal Company, Consolidated," the therein-named defendant, by showing to David Cahn, the person designated by said defendant upon whom process may be served, personally, in the city and county of San Francisco, the annexed certified copy of restraining order and informing him of the contents thereof.

Dated San Francisco, Nov. 9th, 1883.

JOHN SEDGEWICK, *Sheriff*,
By HENRY GILLS,
Deputy Sheriff.

(Endorsed:) Filed Nov. 29th, 1882. T. J. Sherwood, clerk, by E. E. Meek, deputy.

Writ of Injunction.

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

The people of the State of California to the above-named defendant, "Eureka Lake and Yuba Canal Company, Consolidated," send Greeting:

In the above-entitled cause the honorable the superior court
86 of the county of Yuba, in said State, having made an order
that a writ of injunction should issue enjoining and restraining you, the defendant in said cause, from certain acts in said order set forth, we therefore, in consideration thereof, and in obedience to said order, command you, the defendant in said cause, and all your officers, agents, superintendents, managers, servants, and employés, until the further order of this court, to desist and refrain from depositing in, or suffering to flow into, the channel or bed of the Yuba river or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from your hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from said mines, commonly called "mining debris," and also from selling to others or suffering or permitting others to use any portion of the water required or owned by you for
mining or other purposes for the purpose of washing by the
87 hydraulic process the banks or bottoms of any other mine or
other mining ground into the beds or channels of the Yuba river, or any streams, gulches, or ravines tributary thereto.

Witness Hon. Geo. A. Blanchard, judge presiding at request of Hon. Phil. W. Keyser, judge of the said superior court of Yuba county, this 3d day of October, A. D. 1882.

Attest my hand and the seal of said court the day and year last above written.

T. J. SHERWOOD, *Clerk*,
[SEAL.] By E. E. MEEK, *Deputy Clerk*.

SHERIFF'S OFFICE, CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed injunction on the 9th day of November, A. D. 1882, and personally served the same on the 9th of November, A. D. 1882, at 2.20 p. m. of said day, upon Eureka Lake and Yuba Canal Company, Consolidated, the therein-named defendant, by delivering to David Cahn, the person designated by said defendant upon whom process may be served, personally, in the city and county of San Francisco, a copy of said injunction, at the same
time showing to him the annexed original injunction and
88 informing him of the contents thereof; and I further certify
that at the time of said service I also delivered to the said David Cahn, as above, a copy of the complaint in said action, with verification attached.

Dated San Francisco, Nov. 9th, 1882.

JOHN SEDGEWICK, *Sheriff*,
By HENRY GILLE, *Deputy Sheriff*.

(Endorsed:) Writ of injunction. Filed Nov. 29th, 1882. T. J. Sherwood, clerk, by E. E. Meek, deputy.

Order to Show Cause.

In the Superior Court of the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

On reading and filing affidavits of David Cahn, William Steinhart, and Edward Chevassus, and it appearing to me therefrom that good reason exist therefor, it is hereby ordered that the above-named plaintiff be and appear before the said court, at the court-room thereof, at the city of Marysville, in the county of Yuba, State of California, on the 16th day of December, 1882, at the opening of
court on said day, or as soon thereafter as counsel can be
89 heard, then and there to show cause why the return of the
sheriff of the city and county of San Francisco upon the summons in said cause mentioned in the affidavit of David Cahn shall not be vacated and set aside. And it is further ordered that the time for said defendant to appear and plead to the complaint in the said action be, and the same is hereby, extended for the period of five days from and after the decision of this order to show cause. Let this order and the accompanying affidavit be served on the attorneys for plaintiff at least five days before the hearing.

Dated Dec'r 5th, 1882.

GEO. A. BLANCHARD,
Superior Judge Presiding.

Due service of the within order to show cause is hereby admitted this 6th day of December, A. D. 1882.

B. W. HOWSER,
Dist. Att'y of Yuba Co., Cal., and Att'y for Plaintiff.

90 (Endorsed:) Order to cause. Filed 6th December, 1882. T. J. Sherwood, clerk, by E. E. Meek, deputy.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

In the Superior Court, County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

David Cahn, of lawful age, being duly sworn, says: I am now, and have been for several years, a resident of the city and county of San Francisco, and a member of the firm of Lazard Frères, doing business as bankers in said city and county. On the 9th day 91 of November, 1882, a person who was then, and is now, unknown to me, called upon me at the banking house of Lazard Frères in said city and county and asked me if my name was David Cahn; upon being informed by me that that is my name, the said person asked if I was the managing agent of the Eureka Lake and Yuba Canal Company, Consolidated, to which question I answered that I was not; said person then stated that he had been directed to serve upon me as the managing agent of the Eureka Lake and Yuba Canal Company, Consolidated, certain papers which he held in his hand, and offered me; I again informed him that I was not the managing agent or officer of said corporation and would not accept service of, or receive as such, any papers whatever. Said person then placed upon my desk, and went away leaving there, two printed certified copies of a verified complaint purporting to be the complaint in an action pending in the superior court of the county of Yuba, entitled "County of Yuba, plaintiff, *vs.* Eureka Lake and Yuba Canal Company, Consolidated, defendant," and a paper purporting to be a copy of the summons in the same 92 cause, which paper is attached hereto, marked "Exhibit A," and made a part hereof. I am not now, nor was I on the said 9th day of November, 1882, nor have I been at any time within one year last past, or more, the managing or business agent of the said Eureka Lake and Yuba Canal Company, Consolidated, nor the cashier, secretary, or other officer of said corporation. The said Eureka Lake and Yuba Canal Company, Consolidated, is a foreign corporation, organized and existing under the laws of the State of New York, and has its principal place of business in the city of New York, in said State of New York. I am informed and believe that the said business of said corporation mentioned in the said complaint of the county of Yuba against said corporation left with me, as aforesaid, is now and was on the said 9th day of November, 1882, and for a long time before that day had been, under the management and direction of one A. S. Bigelow, whose residence is now, and has been during all said time, in the county of Nevada, State of California, who is, and was during the time aforesaid, the 93 regularly constituted, appointed, authorized, and acting business agent and superintendent of said corporation, in charge of said business; and, on information and belief, I say that on the said 9th day of November, 1882, that the said corporation did not have, and had not for a long time had, any other managing or business agent or superintendent or other officer in the State of California except said A. S. Bigelow.

D. CAHN.

Subscribed and sworn to before me this 2d day of December, A. D. 1882.

[SEAL.] JAMES MASON,
Notary Public.

State of California,
City and County of San Francisco, } *ss:*

In the Superior Court of the County of Yuba, State of California.

County of Yuba, Plaintiff,
vs.
Eureka Lake and Yuba Canal Company, Consolidated, Defendant.

93½ Edward Chevassus, being duly sworn, on oath deposes and says: I am now and have been for six years last past employed as paying teller in the banking-house of Lazard Frèses at San Francisco, California, of which banking-house Mr. David Cahn is one of the partners, and is resident manager in San Francisco. I am now and have for five years last past been a stockholder in the Eureka Lake and Yuba Canal Company, Consolidated, the defendant in the above-entitled action, and as such have occasion to know and do know the persons engaged in the management of the business affairs of said corporation in this State. I know that said David Cahn was not, on the 9th day of November, 1882, and had not been for more than one year prior thereto, and is not now, the managing agent, or the business agent, or the cashier, or the secretary of said defendant. Said defendant had on said 9th day of November, 1882, and has now a managing and business agent within the State, namely, A. S. Bigelow, a resident of the county of Nevada, in this State, who is now and *and* for more than twelve months last past has been the managing and business agent of said defendant.

94 [SEAL.] E. CHEVASSUS.

Subscribed and sworn to before me this second day of December, A. D. 1882.

JAMES MASON,
Notary Public.

State of California,
City and County of San Francisco, } *ss:*

In the Superior Court of the County of Yuba, State of California.

County of Yuba, Plaintiff,
vs.
Eureka Lake and Yuba Canal Company, Consolidated, Defendant.

William Steinhart, being duly sworn, on oath deposes and says: I am now and for more than twenty-five years last past have been engaged in mercantile business in the city of San Francisco, as a member of the mercantile firm of W. & I. Steinhart & Co.

95 I am now and for five years last past have been a stockholder in the Eureka Lake and Yuba Canal Company, Consolidated, the defendant in the above-entitled action, and as such have occasion to know and do know the persons engaged in the management of the business affairs of said corporation in this State. I know that David Cahn was not on the 9th day of November, 1882, and had not been for more than one year prior thereto, and is not now, the managing agent, or business agent, or the cashier, or the secretary of said defendant. Said defendant had on the said 9th day of November, 1882, and has now a managing and business agent within this State, namely, A. S. Bigelow, a resident of the county of Nevada, State of California, who is and for more than twelve months last past [has] been the managing and business agent of said defendant.

[SEAL.] W. M. STEINHART.

Subscribed and sworn to before me this second day of December, A. D. 1882.

JAMES MASON,
Notary Public.

96 Due service of the within affidavits is hereby admitted this sixth day of December, A. D. 1882.

B. W. HOWSER,
Dist. Att'y of Yuba County, Cal.; and Att'y for Plaintiff.

(Endorsed:) Affidavits of David Cahn, Edward Chevassus, and William Steinhart. T. J. Sherwood, clerk, by E. E. Meek, deputy. Filed 6th day of Dec., 1882.

City and County of San Francisco,
STATE OF CALIFORNIA, } *ss:*

In the Superior Court of the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,

vs.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

97 Henry Gille, being duly sworn, says: I am over the age of 22 years. I now am, was on the 9th day of November, A. D. 1882, and for a long time prior thereto had been, a duly appointed, qualified, and acting deputy sheriff of said city and county of San Francisco, by virtue of an appointment made by John Sedgwick, sheriff of said city and county of San Francisco; that on the 9th day of November, A. D. 1882, at said city and county of San Francisco, as such deputy sheriff, I served on the defendant in the above-entitled action the summons and writ of injunction issued in said action by delivering to David Cahn, the person designated by said defendant upon whom process issued by the laws of this State may be served, personally a copy of each of said summons and said writ of injunction, together with two certified [copies]

of the complaint filed in said action; and deponent further says that just prior to making the service of said process, as aforesaid, the said David Cahn, in response to a question asked by deponent, stated that he, said Cahn, was not the managing agent of said de-
98 fendant, and would not receive or accept service of papers in
said action as such; that thereupon this deponent informed said Cahn that he, deponent, was instructed to serve him with said process, as he, said Cahn, was the proper person upon whom to make such service, and that, therefore, he made such service as hereinbefore set forth; and deponent further says that he did not at any time state to said Cahn that he, deponent, had been instructed to serve said process upon him, said Cahn, as managing agent of said defendant, nor did he serve him with said process as managing agent of said defendant.

HENRY GILLE.

Subscribed and sworn to before me this 12th day of December, A. D. 1882.

W. S. LAWTON,
Deputy Co. Clerk in and for the City and
County of San Francisco, State of California.

(Endorsed:) Affidavit of Henry Gille. Filed 23 December, 1882. T. J. Sherwood, clerk. E. E. Meek, deputy.

99 *Certified Copy of Designation of David Cahn.*

Know all men by these presents that whereas the Eureka Lake and Yuba Canal Company, Consolidated, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at New York city, in said State, but owning mines and water ditches and doing business in the State of California, did, in compliance with the act of the Legislature of the State of California, entitled "An act in relation to foreign corporations," approved April 1st, 1872, on the 15 day of November, A. D. 1872, filed in the office of the secretary of state of the State of California an instrument designating Charles Allenberg, of Moor's Flat, in the county of Nevada, State of California, as the person upon whom process issued by authority of or under any law of the State of California might be served;

And whereas said corporation has changed its principal place of business in the State of California from Moor's Flat to the city and county of San Francisco in said State:

Now, therefore, the said Eureka Lake and Yuba Canal Company, Consolidated, has revoked, countermanded, annulled, and
100 made void, and by these presents does revoke, annul, coun-
termand, and make void, the appointment of said Charles Allenberg as the person upon whom such process may be served; and in place of him, the said Charles Allenberg, the Eureka Lake and Yuba Canal Company, Consolidated, a corporation as aforesaid, does hereby nominate, designate, and appoint David Cahn, of 205 Sansome street, in the city of San Francisco, State of California, as

the person upon whom process issue by authority of or under any law of the State of California may be served, and all process served upon said David Cahn will be valid and binding upon said corporation.

In witness whereof the Eureka Luke and Yuba Canal Company, Consolidated, has caused these presents to be executed by its president and secretary, and its corporate seal to be hereto affixed by resolution of its board of directors passed the 9th day of March, 1880, and duly entered in its minutes.

[SEAL.] H. WOODLEAF, *Pres'd't.*
JULIUS BEER, *Secretary.*

101 STATE OF NEW YORK,
City and County of New York, } *ss:*

On this ninth day of March, A. D. 1880, before me, Edwin F. Corey, a commissioner for the State of California, duly commissioned and qualified and residing in the city of New York, personally appeared H. Woodleaf and Julius Beer, known to me to be the president and secretary of the Eureka Lake and Yuba Canal Company, Consolidated, the corporation described in and who executed the within instrument, by their said president and secretary, who severally acknowledged to me that they executed the same as the act and deed of said company.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] EDWIN F. COREY,
Commissioner for the State of California in New York.

102 STATE OF CALIFORNIA, *Department of State:*

I, D. M. Burns, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of an appointment of an agent for the Eureka Lake and Yuba Canal Company, Consolidated, with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof; also that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of the State, at office, in Sacramento, California, this 15th day of November, A. D. 1882.

[SEAL.] D. M. BURNS,
Secretary of State,
By GEO. GALE, *Deputy.*

(Endorsed:) Filed in the office of the secretary of state the 29th day of March, A. D. 1880. D. M. Burns, secretary of state, by Thos. U. Reynolds, deputy. Filed 23 Dec'r, 1882. T. J. Sherwood, clerk, by T. H. Kernan, deputy.

103 *Minutes of Court, Dec. 23, 1882.*

In the Superior Court in and for Yuba County, State of California.

SATURDAY, *December 22d*, 1882.

The court met at the hour of 10 o'clock a. m.

Present: Hon. George A. Blanchard, judge of the superior court of the county of Colusa, presiding at the request of Hon. Phil. W. Keyser, judge of the superior courts of the counties of Yuba and Sutter; H. L. McCoy, sheriff, and T. J. Sherwood, clerk.

Whereupon the following proceedings were had:

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL, Consolidated, Defendant.

In the above-entitled cause, having heard argument of counsel upon motion to set aside the return of the sheriff of the city and county of San Francisco of service of summons upon said defendant:

It is hereby ordered that said motion be, and the same is hereby, denied.

104 *Affidavits of McIlmoil and Davis.*

STATE OF CALIFORNIA, } *ss:*
County of Yuba, }

In the Superior Court in and for the County of Yuba.

STATE OF CALIFORNIA, COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

R. H. McIlmoil, being first duly sworn, deposes and says that the "Eureka Lake and Yuba Canal Company, Consolidated," is a party to this suit, and by a writ of injunction issued in this cause on the 2d day of October, 1882, and, as affiant is informed and believes, duly served upon said defendant on the 9th day of November, A. D. 1882, was enjoined and restrained from depositing in or suffering to flow into the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris;" that, as affiant is informed and believes, said 105 injunction is still in full force and effect; that on the 29th day of December, A. D. 1882, the said defendant, in wilful and wanton disregard of said injunction, was, at or near Columbia Hill, in the county of Nevada, in said State, operating and mining its said mines, or a portion thereof, by the hydraulic process, aided by a large force of men employed by it, and by twelve hundred inches of water passing through large iron pipes and "Monitors" and "Little Giants," under a vertical pressue of several hundred feet, and was running, suffering, and causing the tailings, earth, sand, clay, sediment, stones, and other "mining debris" from its said mines to flow into the beds and channels of said rivers and their tributary streams, gulches, and ravines at the rate of six thousand (6,000) cubic yards per day; and affiant further says that he is informed and believes that said defendant, ever since the service of said writ of injunction as aforesaid, has been constantly engaged in conducting its said mining operations as aforesaid in utter disregard of said writ and in contempt of said court issuing and ordering the same.

R. M. McILMAIL.

Subscribed and sworn to before me this 11th day of January, 1883.

J. K. HARE,
Clerk Superior Court, Yuba Co., Cal.,
[SEAL.] By T. H. KERNAN,
Dep'y Clerk.

(Endorsed:) Filed 20th Jan'y, 1883. J. K. Hare, clerk, by E. E. Meek, deputy.

106 Service of the within on me acknowledged by copy the 28th day of April, 1883.

JAS. K. BYRNE,
Attorney for Def't.

STATE OF CALIFORNIA, }
County of Yuba, } *ss:*

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,

vs.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

E. A. Davis, being first duly sworn, deposes and says that he is one of the counsel for plaintiff in the above-entitled cause, and that Eureka Lake and Yuba Canal Company, Consolidated, is the defendant therein; that on the 3d day of October, A. D. 1882, the judge presiding of this court made an order in said cause restraining the said defendant, its officers, agents, superintendents, managers, servants, and employés, from depositing in or suffering to flow into the channel or bed of the Yuba river, or into the channel or bed of the Middle Yuba river or the South Yuba river, or
107 into the tributaries, streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris."

That thereupon on said day a writ of injunction pursuant to and conforming to the terms of said order was duly issued under the seal of said court, and was thereafter, to wit, on the 9th day of November, A. D. 1882, duly served upon the said defendant, "Eureka Lake and Yuba Canal Company, Consolidated," at the city and county of San Francisco, in this State, by the sheriff of said city and county then and there serving upon and leaving with one David Cahn a copy of said writ of injunction, at the same time showing to him the original thereof and informing him of its contents, and also at the same time leaving with and delivering to him a copy of the complaint in said action and verification attached; that at the time of the service of said writ of injunction as aforesaid the said defendant was, and for more than six months prior thereto had been, and still now is, a foreign corporation, formed and organized under the laws of the State of New York, and doing business in 108 this State; that at the time of said service aforesaid the said David Cahn was the person appointed and designated by said defendant according to law upon whom said writ and process should be served as and for service upon said defendant.

Affiant further says that the business of said corporation defendant in this State is hydraulic mining; that its mining claims and and property are situated at or near Columbia Hill, in the county of Nevada, in the northwestern portion thereof; that, as affiant is informed and believes, one A. S. Bigelow is now the managing agent and superintendent, and that said David Cahn, residing at the city and county of San Francisco, is still the person designated, as aforesaid, by said defendant upon whom to serve any process issued to or against it by authority of or under any law of this State.

Affiant further says that said injunction of said court is still in full force and effect.

[SEAL.] E. A. DAVIS.

Subscribed and sworn to before me this 11th day of January, 1883.

J. K. HARE, *Co. Clerk*,
By THOS. H. KERNAN, *Dep. Clerk*.

109 (Endorsed:) Affidavit of E. A. Davis. Filed 20th January, 1883. J. K. Hare, clerk, by E. E. Meek, deputy.

Service of the within on me acknowledged by copy this 28th day of April, 1883.

JAS. K. BYRNE,
Def't's Att'y.

110 *Demurrer.*

In the Superior Court of the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,

vs.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

The above-named defendant now comes, by its attorneys, and demurs to the complaint of said plaintiff heretofore filed in this cause, and for grounds of demurrer assigns the following:

I.

The court has no jurisdiction of the person of the defendant nor of the subject of the action.

II.

The plaintiff has not the legal capacity to sue or to maintain this action.

III.

Several causes of action have been improperly united in the said complaint in this, to wit: In the first count or cause of action, as stated in said complaint, three several and separate causes of
111 action have been improperly united, that is to say:

1st. A cause of action for the alleged and threatened injury to lot four (4), of block six (6), in range letter "D," as known and designated upon the map of the city of Marysville, as the same is described in said complaint.

2d. A cause of action for the alleged and threatened injury to the north half of lot three (3), of block six (6), in range letter "D," as known and designated upon the map of the city of Marysville, as the same is described in said complaint.

3d. A cause of action for the alleged and threatened injury to lot one (1), of block fourteen (14), in range letter H, as known and designated upon the map of the city of Marysville, as the same is described in said complaint.

In the second count or cause of action, as stated in said complaint, two several and separate causes of action have been improperly united, that is to say:

1st. A cause of action for alleged and threatened injury to the bridge mentioned in said second count or cause of action; and,

2d. A cause of action for alleged and threatened injury to
112 the roads and highways mentioned in said second count or cause of action.

The several causes of action stated in the first count or cause of action in said complaint are for an alleged and threatened injury to an asserted proprietary interest in the plaintiff in the several lots of land therein described, while the said several causes of action in the second count or cause of action set forth are for an alleged and threatened injury to public rights and uses in a bridge and highway.

IV.

The said complaint does not state facts sufficient to constitute a cause of action against this defendant.

V.

It appears upon the face of said complaint that the causes of action set forth therein were at the time of the commencement of said action and are barred by the provisions of section 338 of the Code of Civil Procedure of the State of California.

VI.

It appears upon the face of said complaint that the cause of action set forth therein were at the time of the commencement 113 of said action and are barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

VII.

Defendant demurs specially to the first count or cause of action set forth and contained in said complaint upon the grounds—

1st. It appears upon the face of said count or cause of action that the said court has no jurisdiction of the person of the defendant, nor of the subject-matter of the action as stated in said first count.

2d. It appears upon the face of said first count or cause of action that the plaintiff has not the legal capacity to sue or to maintain this action against the defendant.

3d. The said count or cause of action is ambiguous, unintelligible, and uncertain, in this, it is therein alleged that the defendant and seven other persons are, and for several years past have been, engaged in hydraulic mining within and upon the watershed of the Yuba river, and are and have been discharging the tailings from their several mines into the said river and its tributaries, and that by reason thereof the channel of said river has become filled and 114 obstructed, and the enjoyment of the property and easements claimed by the plaintiff has been interfered with and endangered, but does not state or show how many or what persons were so engaged in mining, nor what proportion, if any, of such filling and obstruction has been caused by tailing from the defendant's mines.

4th. The said first count or cause of action does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendant.

5th. It appears upon the face of said first count that the cause- of action therein set forth were, at the time of the commencement of this action, and are, barred by the provisions of section 338 of the Code of Civil Procedure of the State of California.

6th. It appears upon the face of said first count that the cause- of action therein set for forth were, at the time of the commencement of this action, and are, barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

VIII.

Defendant demurs specially to the second count or cause of action set forth and contained in said complaint upon the ground—

1st. It appears upon the face of said count or cause of action that the said court has no jurisdiction of the person of the defendant nor of the subject-matter of this action, as stated in said second count.

115 2d. It appears upon the face of said second count or cause of action that the plaintiff has not the legal capacity to sue or to maintain this action against the defendant.

3d. The plaintiff has not the legal capacity to sue or to maintain an action upon the facts set forth therein, because it appears on the face of the second count or cause of action that the plaintiff has no proprietary interest in any of the property therein mentioned and therein alleged to be injured or threatened with injury by the alleged acts of this defendant.

4th. The said second count or cause of action does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendant.

5th. It appears upon the face of said second count that the causes of action therein set forth were, at the time of the commencement of this action, and are, barred by the provision- of sec*ond* 338 of the Code of Civil Procedure of the State of California.

6th. It appears upon the face of second count that the causes of action therein set forth were, at the time of the commencement of this action, and are, barred by the provision- of section 343 of the Code of Civil procedure of the State of California.

116 Wherefore *deponent* prays that it be hence dismissed, with costs.

JAS. K. BYRNE,
W. C. BELCHER,
Att'ys for said Defendant.

S. M. WILSON,
WM. T. WALLACE,
Of Counsel.

(Endorsed:) Service of copy acknowledged this 17th day of January, 1883, S. M. Bliss, att'y for pl'f. Filed January 17th, 1883. J. K. Hare, clerk, by T. H. Kernan, dep'y clerk.

117 *Minutes of Court.*

In the Superior Court of the County of Yuba, State of California.

COUNTY OF YUBA
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated.

SATURDAY, *January* 20, 1883.

Hon. Phil. W. Keyser, judge, presiding; U. L. McCoy, sheriff, and J. K. Hare, clerk.

On motion of counsel for plaintiff and filing affidavits, ordered that defendant show cause before this court, on Friday, February 2d, 1883, why it should not be punished for contempt in disobeying injunction in this cause.

118 *Order to Show Cause.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba, Plaintiff,

vs.

Eureka Lake and Yuba Canal Company, Consolidated, Defendant.

It appearing to the court from the affidavits of R. H. McIlmoil and E. A. Davis, made on the 11th day of January, A. D. 1883, and which are filed at the date hereof, that the defendant in the above-entitled cause, "Eureka Lake and Yuba Canal Company, Consolidated," a foreign corporation, engaged in hydraulic mining in the county of Nevada, in this State, was enjoined and restrained by the order of this court from depositing in or sufferingto flow into the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris," and that said injunction order was duly served upon 119 said corporation, defendant, on the 9th day of November, A. D. 1882, and that said order is still in full force and effect; and it further appearing from said affidavits that said corporation, defendant, on the 29th day of December, A. D. 1882, in wilful and gross disobedience of said injunction order of this court, did deposit in and did suffer to flow into the channels and beds of the said rivers and also into the tributary streams, gulches, and ravines which lead into said rivers, a large quantity of tailings from its said hydraulic mines, located at or near Columbia hill, in said county of Nevada, said tailings being generally known as "mining debris," and consisting of earth, clay, sand, sediment, and stones; and it further appearing from said affidavits that at the time of the service as aforesaid of said injunction order one A. S. Bigelow was, ever since has been, and now is, the managing agent and superintendent of said corporation, defendant, and that during all said times one David Cahn was and now is a resident of the city and county of San Francisco, and was and now is the person designated by said corporation, defendant according to law, upon whom to serve any process issued to or against it by authority of or under any law of this State:

120 Now, therefore, it is ordered that the said defendant, "Eureka Lake and Yuba Canal Company, Consolidated," show cause before this court, at the court-room of this court, at the court-house, in the city of Marysville, on Friday, the 2d of February, A. D. 1883, at the hour of 10 o'clock a. m. of that day, why it should not be punished for a contempt of court for its refusal to obey and its aforesaid violation of said injunction order of this court.

And it is further ordered that service of a copy of this order and of said affidavits, eight days before the return day aforesaid, upon either the said A. S. Bigelow, managing agent and superintendent of said defendant aforesaid, or upon said David Cahn, the said person so as aforesaid designated by said defendant aforesaid upon whom to serve any process issued to or against it by authority of or under any law of this State shall be sufficient service of this order.

Jan. 20th, 1883.

PHIL. W. KEYSER, *Judge.*

(Endorsed:) Order to show cause. Filed 20th Jan'y, 1883. J. K. Hare, clerk, by E. E. Meek, deputy.

121 *Minutes of Court.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba
vs.
Eureka Lake and Yuba Canal Company, Consolidated.

Saturday, *March 3d,* 1883.

Hon. Phil. W. Keyser, judge presiding; H. L. McCoy, sheriff, and J. K. Hare, clerk.

It appearing from the affidavits of R. H. McIlmoil and E. A. Davis herein filed that a writ of injunction in this cause was issued on the 3d day of October, 1882, and, as affiant believes, was served on said defendant on the 9th day of November, 1882, at the city of San Francisco — was enjoined and restrained from dumping or suffering to flow into the Yuba or South Yuba river-, or any of the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, commonly known as "mining debris;" that said defendant did, on the 29th day of December, 1882, in wilful and wanton disregard of said injunction, at or near Columbia Hill, in the county of Nevada, operating its said 122 mines, or a portion thereof, by hydraulic process, aided by a large force of men employed by it and by 1,200 inches of water passing through large iron pipes, "Monitors and Little Giants," under pressure of several hundred feet, was running, suffering, and causing its tailings, earth, sand, clay, sediment, and other "mining debris" to flow into the beds and channels of said rivers and tributary streams, gulches, &c., of said rivers, at the rate of 6,000 cubic yards per day, in violation of said order, now, therefore, it is ordered that said defendant show cause before this court, on Saturday, the 24th day of March, 1883, at 2 o'clock p. m., why it should not be punished for a contempt in disobeying the order of this court in violation of said injunction order.

123 *Order to Show Cause.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba, Plaintiff,
vs.
Eureka Lake and Yuba Canal Company, Consolidated, Defendant.

It appearing to the court from the affidavits of R. H. McIlmoil and E. A. Davis made on the 11th day of January, A. D. 1883, and

which are now on file herein, that the defendant in the above-entitled cause, "Eureka Lake and Yuba Canal Company, Consolidated," a foreign corporation engaged in hydraulic mining in the county of Nevada, in this State, was enjoined and restrained by the order of this court "from depositing in or suffering to flow into the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into the said streams any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris;" and that said injunction order was
124 duly served upon said corporation defendant on the 9th day of November, A. D. 1882, and that said order is still in full force and effect;

And it further appearing from said affidavits that said corpora-defendant, on the 29th day of December, A. D. 1882, in wilful and gross disobedience of said injunction order of this court, did deposit in and suffer to flow into the channels and beds of said rivers, and also into the tributary streams, gulches, and ravines which lead into said rivers, a large quantity of tailings from its said hydraulic mines, located at or near Columbia Hill, in county of Nevada, said tailings being generally known as "mining debris," and consisting of earth, clay, and sediment and stones;

And it further appearing from said affidavits that at the time of the service as aforesaid of said injunction order one A. S. Bigelow was, ever since has been, and now is, the managing agent and superintendent of said corporation defendant, and that during all said time one David Cahn was, and now is, a resident of the city and county of San Francisco; was, and now is, the person designated by said corporation defendant according to law upon whom
125 to serve any process issued to or against it by authority of or under any law of this State:

Now, therefore, it is ordered that said defendant, "Eureka Lake and Yuba Canal Company, Consolidated," show cause before this court, at the court-house in the city of Marysville, in said county of Yuba, on Saturday, the 24th day of March, A. D. 1883, at the hour of ten o'clock a. m. of that day, why it should not be punished for a contempt of court for its refusal to obey and its aforesaid violation of said injunction order of this court.

And it is further ordered that service of a copy of this order and of said affidavits, ten days before the return day aforesaid, to wit, said 24th day of March, A. D. 1883, upon either the said A. S. Bigelow, managing agent and superintendent of said defendant aforesaid, or upon said David Cahn, the said person so as aforesaid designated by said defendant aforesaid upon whom to serve any process issued to or against it by authority of or under any law of this State, shall be sufficient service of this order.

Done in open court this third day of March, 1883.

PHIL. W. KEYSER,
Judge of said Superior Court.

126 [Endorsed:] Order to show cause for contempt. Rec. March 5th, 1883, 1.15 p. m. Original. Filed March 15, 1883. J. K. Hare.

127 *Return of Sheriff on Order to Show Cause.*

SHERIFF'S OFFICE, CITY AND COUNTY OF SAN FRANCISCO,
STATE OF CALIFORNIA.

I hereby certify that I received the annexed order to show cause for contempt on the 5th day of March, A. D. 1883, and personally served the same on the 5th day of March, 1883, upon the said defendant, The Eureka Lake and Yuba Canal Company, Consolidated, by delivering to David Cahn, the person designated by said defendant upon whom process issued by the laws of this State may be served, at said city and county of San Francisco, a copy of said order to show cause, together with certified copies of the affidavits of E. A. Davis & R. H. McIlmoil, upon which said order to show cause was based; and I further certify that the said David Cahn informed me at the time of said service that he is not now, nor has he been for some time past, an officer of said company.

Dated San Francisco, March, 1883.

PATRICK CONNOLY, *Sheriff.*
J. J. MURPH, *Deputy Sheriff.*

128 *Motion to Set Aside Order.*

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

The above-named defendant now comes, by its attorneys, and moves the court to vacate and set aside a certain order made in said cause by said court, Hon. Phil. W. Keyser, presiding, on the 3d day of March, 1883, of which said order the following is a copy:

(Title of court and cause.)

It appearing to the court from the affidavits of R. H. McIlmoil and E. A. Davis, made on the 11th day of January, 1883, and which are now on file herein, that the defendant in the above-entitled cause, "Eureka Lake and Yuba Canal Company, Consolidated," a foreign corporation engaged in hydraulic mining in the county of Nevada, in this State, was enjoined and restrained by the order of this court from depositing in or suffering to flow into the channels or bed of the Yuba river, or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary 129 streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris," and that said injunction order was duly served upon said corporation, defendant, on the 9th day of November, A. D. 1882, and that said order is still in full force and effect.

And it further appearing from said affidavits that said corporation, defendant, on the 29th day of December, A. D 1882, in willful and gross disobedience of said injunction order of this court, did deposit in and did suffer to flow into the channels and beds of the said rivers, and also into the tributary streams, gulches, and ravines which lead into said rivers, a large quantity of tailings from its said hydraulic mines located at or near Columbia hill, in said county of Nevada, said tailings being generally known as "mining debris," and consisting of earth, clay, sand, sediment, and stones; and it further appearing from said affidavits that — the time of the service as aforesaid of said injunction order one A. S. Bigelow was, ever since has been, and now is, the managing agent and superintendent of said corporation, defendant, and that during all
130 said times one David Cahn was and now is a resident of the
city and county of San Francisco, and was and now is the person designated by said corporation, defendant, according to law, upon whom to serve any process issued to or against it by authority of or under any law of this State:

Now, therefore, it is ordered that the said defendant, "Eureka Lake and Yuba Canal Company, Consolidated," show cause before this court, at the court-room of this court, at the court-house, in the city of Marysville, in said county of Yuba, on Saturday, the 24th day of March, A. D. 1883, at the hour of ten o'clock a. m. of that day, why it should not be punished for a contempt of court for its refusal to obey and its aforesaid violation of said injunction order of this court. And it is further ordered that service of a copy of this order and of said affidavits ten days before the return aforesaid, to wit, said 24th day of March, 1883, upon either the said A. S. Bigelow, managing agent or superintendent of said defendant aforesaid, or upon said David Cahn, the said person so aforesaid designated by said defendant aforesaid upon whom to serve any process issued to or against it by authority of or under any law of this State, shall be sufficient service of this order.

131 Done in open court this 3d day of March, 1883.

PHIL. W. KEYSER, *Judge.*

The grounds upon which this motion is made are as follows:

1st. That said injunction order dated October 2d, 1882, was made without authority of law, and is absolutely void, for the reason that the said superior court of Yuba county had no jurisdiction of the person of the defendant at the time the said order was made and issued.

2d. That said injunction order dated October 3d, 1882, was made and issued without authority of law, and is absolutely void, for the reason that the judge who made the same was at the time the same was made disqualified by law to make the said order.

3d. That the said injunction order dated October 3d, 1882, was made without authority of law, and is absolutely void, for the reason that it is an injunction to suspend the general and ordinary business of a corporation, to wit, the general and ordinary and only business of the defendant, and was not granted by the court nor by a judge thereof, but was granted by the judge of another court, to wit, by the superior judge of the county of Colusa, and was granted without due notice or any notice whatever to the proper officers, or any officer — officers, or to the managing agent or to any agent of said corporation of the application therefor. 132

4th. That the said injunction order dated October 3d, 1882, was made without authority of law, and is absolutely void, because it was made by said superior judge of the county of Colusa before the complaint in said action was filed, and before summons in said action was issued.

5th. That the said injunction order dated October 3d, 1882, was never served on the defendant.

6th. That the order to show cause why defendant should not be punished for a contempt of this court in disobeying said order of October 3d, 1882, made March 3d, 1883, was never served upon the defendant.

JAS. K. BYRNE & W. S. BELCHER,
Att'ys for Def't.

S. M. WILSON,
W. T. WALLACE,
Of Counsel.

To the plaintiff in the above-entitled action, and to S. M. Bliss, Esq., district attorney of the county of Yuba and attorney for plaintiff, and Messrs. Stabler & Bayne and E. A. Davis, of counsel:

133 Please take notice that on Monday, the 19th day of March, 1883, in the opening of court on said day, or as soon thereafter as counsel can be heard, the above-named defendant will move the court to hear and determine the foregoing motion to vacate and set aside the order of this court, dated March 3d, 1883, and therein referred to. Said motion *motion* will be made and based upon the files, records, and minutes of the court, and upon a certified copy of certain documents now on file in the office of the secretary of state of the State of California, one of which is a revocation of a certain instrument by which David Cahn was designated as the person upon whom civil process may be served in any suit against said defendant in this State, and the other of which is an instrument by which A. S. Bigelow was and is designated by said defendant as the person upon whom such process may be served; and also upon affidavits, copies of which are herewith served upon you, and upon the oral testimony of witnesses then and there to be produced and examined.

J. K. BYRNE,
W. C. BELCHER,
Atty's for Def't.

S. M. WILSON,
WM. T. WALLACE,
Of Counsel.

134 *Affidavits of Byrne and Sweeney.*

STATE OF CALIFORNIA,
City & County of San Francisco, } *ss:*

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

J. K. Byrne, being duly sworn, on oath deposes and says: I am one of the attorneys for defendant in the above-entitled action. I have examined the complaint and summons on file in the office of the clerk of said court, and it appears therefrom that said complaint was filed and said summons was issued on the 3d day of October, 1882. It also appears therefrom that an injunction order in said cause was made on the same day. I am informed and believe that the first attempt to make service of said complaint and summons upon the defendant was made on the 9th day of October, 1882, at which time a copy of said complaint and summons was left with David Cahn at the city and county of San Francisco, as particularly stated by said Cahn in an affidavit made by him in this cause on the
2d day of December, 1882, and which is now on file herein, and
135 to which I hereby refer and make a part of this affidavit. I am
informed and believe that no other service than that mentioned in said affidavit has ever been made on defendant or upon any officer or agent of defendant, and that no other injunction order, excepting that made on the 3d day of October, 1882, has been made in this cause. I am informed and believe that said order was not made by the court nor by a judge thereof, but was made by Hon. G. A. Blanchard, who was then the superior judge of the county of Colusa, and that no notice of the application for said order was given to the proper officer, or any officer or managing agent, or any agent of said defendant, prior to the making of said order, and that at the time said order was made the said court had not acquired jurisdiction of the party defendant herein.

I am also informed and believe that the defendant is a corporation, and that its general and ordinary and sole and only business is mining by the hydraulic process and selling to others water to be used for the like purpose; that said defendant's mines are situated solely in the county of Nevada, in this State; and that the tailings
and water therefrom necessarily flow into tributary of
136 the Yuba river; that the business of said defendant cannot
be carried on in any other way or manner, nor at any other place, than that above mentioned, and that the said injunction order dated October 3d, 1882, suspends not only the general and ordinary business of said corporation defendant, but its sole and only business. I am also informed and believe that no service of the order to show cause why said defendant should not be punished for a contempt of the above-entitled court in disobeying any said order of October 3d, 1882, dated March 3d, 1883, has been made upon said

defendant, nor upon any officer or agent of said defendant, nor upon the person designated by defendant according to law as the person upon whom civil process issued against it out of any court of this State may be served; that upon the 5th day of March, 1883, a copy of said order dated March 3d, 1883, and copies of the affidavits mentioned therein were left with David Cahn at the city and county of San Francisco; but that said Cahn was not on the 5th day of March, 1883, and had not been for more than one month prior thereto, the person so designated by defendant, and was not 137 on said day, and had not been for more than one year prior thereto, an officer or agent of said defendant, and that no service of said order dated March 3d, 1883, has been made upon A. S. Bigelow, the person who was at the time of making said order, and is now, the person so designated by the defendant.

J. K. BYRNE.

Subscribed and sworn to before me this 13th day of March, 1883.
[SEAL.] LEWIS B. HARRIS.
Notary Public.

138 STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY (Consolidated), Defendant.

M. D. Sweeney, being duly sworn, deposes and says that he is a white male citizen of the United States, more than twenty-one years of age; is not a party to or in anywise interested in said action, and is competent to be a witness on the trial thereof; that on the 13th day of March, 1883, he served upon S. M. Bliss, Esq., district attorney for the county of Yuba and attorney for plaintiff in the above-entitled cause, the motion, notice of motion, and affidavit hereunto annexed by depositing a true copy thereof, enclosed in an envelope, and addressed to said S. M. Bliss, at Marysville, Yuba county, California, his place of business and residence, in the United States post office at San Francisco, California, the place of business of Jas. K. Byrne and W. C Belcher, the attorneys for said defendant, 139 and that he prepaid the postage thereon. Affiant further says there is regular communication by mail between said city of San Francisco and Marysville, Yuba county, California.

M. D. SWEENEY.

Subscribed and sworn to before me this 13th day of March, 1883.
[SEAL.] LEWIS B. HARRIS,
Notary Public.

(Endorsed:) Motion, notice of motion, and affidavit. Filed March 15th, 1883. J. K. Hare, clerk, by T. H. Kernan, dep'ty.

140 *Minutes of Court.*

In the Superior Court in and for Yuba County, State of California.

County of Yuba
vs.
Eureka Lake and Yuba Canal Company, Consolidated.

Saturday, *March* 24, 1883.

Hon. Phil. W. Keyser, judge, presiding; H. L. McCoy, sheriff, and J. K. Hare, clerk.

On motion of counsel for plaintiff it was ordered by the court that the defendant show cause before the court on Monday, April 23, 1883, at 10 o'clock a. m., why it should not be punished for a contempt of court in refusing to obey the injunction heretofore issued in this court and served on defendant on 9th day of November, 1882.

141 *Order to Show Cause.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba, Plaintiff,
vs.
Eureka Lake and Yuba Canal Company, Consolidated, Defendant.

It appearing to the court from the affidavits of R. H. McIlmoil and E. A. Davis, made on the 11th day of January, A. D. 1883, and which are now on file herein, that the defendant in the above-entitled cause, Eureka Lake and Yuba Canal Company, Consolidated, a foreign corporation engaged in hydraulic mining in the county of Nevada, in this State, was enjoined and restrained by the order of this court from depositing in or suffering to flow into the channel or bed of the Yuba river or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, other material discharged from its said mines, commonly called mining debris; and that said injunction order was duly 142 served upon said corporation defendant on the 9th day of November, A. D. 1882, and that said order is still in full force and effect;

And it further appearing from said affidavits that said corporation defendant, on the 29th day of December, A. D. 1882, in wilful and gross disobedience of said injunction order of this court, did deposit and suffer to flow into the channels and beds of said rivers, and also into the tributary streams, gulches, and ravines which lead into said rivers, a large quantity of tailings from its said hydraulic mines located at or near Columbia Hill, in said county of Nevada, said tailings being generally known as "mining debris," and consisting of earth, sand, clay, sediment, and stones;

And it further appearing from said affidavits that, at the time of service as aforesaid of said injunction order, one A. S. Bigelow was, ever since has been, and now is, the managing agent and superintendent of said corporation defendant; and it further appearing from the affidavit of said E. A. Davis, filed herein, that the said A. S. Bigelow is the person appointed and designated by said corporation defendant according to law upon whom to serve any 143 process issued to or against it by authority of or under any law of this State: Now, therefore, it is ordered that the said defendant, Eureka Lake and Yuba Canal Company, Consolidated, show cause before this court, at the court-room of this court, at the courthouse in the city of Marysville, in said county of Yuba, on Monday, the 23d day of April, 1883, at the hour of ten o'clock a. m. of that day, why it should not be punished for a contempt of court for its refusal to obey and its aforesaid violation of said injunction order of this court.

And it is further ordered that service of a copy of this order and of the two first affidavits herein mentioned, ten days before the return day aforesaid, to wit, said 23d day of April, 1883, upon said A. S. Bigelow shall be sufficient service of this order.

Done in open court this 24th day of March, 1883.

PHIL. W. KEYSER, *Judge.*

144 Office of the sheriff of Nevada county, California. R. D. Carter, sheriff; Wm. H. Adams, under sheriff; Richard Freeman, deputy sheriff.

NEVADA CITY, CAL., *April* 7, 1883.

E. A. Davis, Esq., att'y-at-law, Marysville, Cal.:

DEAR SIR: As per your order, if Mr. Bigelow could not be found, to return papers to you C. O. D. within ten days, we have made two trips out to Columbia Hill, going over early in the morning March 31st, and went over late last evening, but could not find him. We have tried to find him, and not to put too much mileage onto you; they say he is not in the county. Was at his residence late last evening, and could not find him this morning. Stayed at Columbia Hill last night, but he did not show up.

Yours truly, R. D. CARTER, *Sheriff.*

145 *Minutes of the Court.*

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated.

WEDNESDAY, *April* 25, 1883.

Hon. Phil. W. Keyser, judge, presiding; U. L. McCoy, sheriff, and J. K. Hare, clerk.

It appearing to this court from the affidavits of E. A. Davis and R. U. McIlmoil, made and herein filed, that A. S. Bigelow, the managing agent of said corporation, the person designated on whom to serve process under the laws of this State, is now and for a long time prior to this date has been personally avoiding, by various means, the service on him of orders of our said court herein to show cause why said defendant should not be punished for a contempt in disobeying said injunction and accompanying affidavits:

Now, therefore, it is ordered that said defendant, the Eureka Lake and Yuba Canal Company, Consolidated, show cause before this court, at the court-house, in the city of Marysville, in said Yuba county, on Monday, the 14th day of May, A. D. 1883, at 10
146 o'clock a. m., why it should not be punished for a contempt of, and for its refusal to obey, and its aforesaid violation of, said injunction.

And it is further ordered that service of a copy of said order and of the affidavits therein mentioned, ten days before the return day, to wit, on the 14th day of May, A. D. 1883, upon J. K. Byrne or W. C. Belcher, attorneys of record herein of said defendant, shall be sufficient service of this order.

Order to Show Cause.

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,

vs.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Def't.

It appearing to the court from the affidavits of R. U. McImoil and E. A. Davis, made on the 11th day of January, A. D. 1883,
147 and which are now on file herein, that the defendant in the above-entitled cause, "Eureka Lake and Yuba Canal Company, Consolidated," a foreign corporation, engaged in hydraulic mining in the county of Nevada, in this State, was enjoined and restrained by the order of this court from depositing in or suffering to flow into the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river, or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris," and that said injunction order was duly served upon said *in*corporation, defendant, on the 9th day of November, A. D. 1882, and that said order is still in full force and effect; and it further appearing from said affidavits that said corporation, defendant, on the 29th day of December, A. D. 1882, in willful and gross disobedience of said injunction order of this court, did deposit in and suffer to flow into the channels and beds of said rivers, and also into the tributary streams, gulches, and ravines which lead into said rivers, a large quantity of tailings from
148 its said hydraulic mines located at or near Columbia Hill, in said county of Nevada, said tailings being generally known as mining debris, and consisting of earth, sand, clay, sediment, and stones.

And it further appearing from said affidavits that at the time of the service as aforesaid of said injunction order one A. S. Bigelow was, ever since has been, and still is, managing agent and superintendent of said corporation, defendant;

And it further appearing from the affidavit of said E. A. Davis, filed herein on the 24th day of March, 1883, that said A. S. Bigelow is the person appointed and designated by said corporation, defendant, according to law, upon whom to serve any process issued to or against it by authority of or under any law of this State;

And it further appearing to said court by the affidavits of said R. U. McIlmoil and E. A. Davis, this day filed herein, that the managing agent and superintendent of said defendant and the person appointed and designated by said defendant according to law upon whom to serve any process issued to or against it by authority
149 of or under any law of this State, is one and the same person, to wit, said A. S. Bigelow, and that said A. S. Bigelow now is, and for a long time prior to this date has been, persistently avoiding, by various means, the service on him of orders of said court herein to show cause why said defendant should not be punished for contempt in disobeying said injunction and accompanying affidavits;

Now, therefore, it is ordered that the said defendant, "Eureka Lake and Yuba Canal Company, Consolidated," show cause before this court, at the court-room thereof, at the court-house, in the city of Marysville, in said county of Yuba, on Monday, the 14th day of May, A. D. 1883, at the hour of ten o'clock a. m of that day, why it should not be punished for a contempt of, and for its refusal to obey, and its aforesaid violation of, said injunction order of this court.

And it is further ordered that service of a copy of this order and of the affidavits herein mentioned, ten days before the return day aforesaid, to wit, said 14th day of May, A. D. 1883, upon J. K. Byrne and W. C. Belcher, Esq., attorneys of record herein for said defendants, shall be sufficient service of this order.

150 Done in open court this 25th day of April, A. D. 1883.

PHIL. W. KEYSER,
Superior Judge.

(Endorsed:) Order to show cause for contempt.

Service of the within on me acknowledged by copy this 20th day of April, 1883.

J. K. BYRNE,
Attorney for Def't.

Filed May 5th, 1883.

J. K. HARE, *Clerk,*
By T. H. KERNAN, *Deputy.*

Affidavits of McIlmoil and Davis.

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba, Plaintiff,
vs.
Eureka Lake and Yuba Canal Company, Consolidated, Defendant.

R. H. McIlmoil, being first duly sworn, deposes and says that he is over the age of 18 years, and is not a party to the above-entitled action.

151 That on the 4th day of February, A. D. 1883, he, at the instance and request of the above-named plaintiff, went to Columbia Hill, in the county of Nevada, in said State, it being the place where the works and mine of said defendant are situated; that he, said affiant, took with him an order of said court, duly made and given by said court, and entered on the record of said court on or about the 2d day of February, A. D. 1883, and commanding said defendant to show cause before said court, on the 24th day of February, A. D. 1883, why it, said defendent, should not be punished for a contempt of said court in disobeying the injunction writ theretofore issued and served on the said defendant in the above-entitled action; affiant further says that he, on said 4th day of February, A. D. 1883, also took with him to said Columbia Hill certified copies of the affidavits of E. A. Davis and R. H. McIlmoil, showing the disobedience by said defendant of said writ of injunction; that the original of said certified copies of said affidavits were filed in said court and cause on or about the 11th day of January, A. D. 1883; affiant further says that he was, by said plaintiff, instructed to serve, and that he intended and endeavored to serve, a certified copy of 152 said order of said court and said certified copies of affidavits on A. S. Bigelow, the superintendent of said defendant'- mine and works.

Affiant further says that on the 5th day of February, A. D. 1883, in his said endeavor to find and serve said Bigelow with said papers, he went to the business office of said Bigelow about — o'clock a. m. of said last-named day and ascertained that there was no person in said office; that he immediately thereafter went to the family residence of said Bigelow and was met at the door of said residence by a lady who informed him that she was the wife of said Bigelow; that this affiant informed said lady that he desired to see said Bigelow and asked her where said Bigelow was; that said lady thereupon said to this affiant, "I think said Bigelow is in the mine; maybe you can see him, and maybe you cannot; I do not know where he is just now," or words of similar import. Affiant further says that said lady exhibited much nervousness and frequently demanded to know affiant's business with said Bigelow; that affiant immediately after said last-named interview went through defendant's said mine and accosted several persons working in said mine, and re-
153 ceived from some of said persons evasive answers as to the

whereabouts of said Bigelow, and was told by others of said workmen that they had not seen said Bigelow for a week.

Affiant further says that he remained at and about said mine, office, and residence until the afternoon of the 6th of February, A. D. 1883, endeavoring to find and serve said Bigelow with said papers but wholly failed so to do.

Affiant further says that he believes said Bigelow, during the said interview between him (the affiant) and said lady, was secreted in his said residence with intent to evade and prevent the service on him (said Bigelow) of said papers.

R. H. McILMOIL.

Subscribed and sworn to before me the 19th day of April, A. D. 1883.

[SEAL.] J. K. HARE, *Cl'k*,
By THOS. H. KERNAN, *Dep'y*.

154 (Endorsed:) Affidavit of R. H. McIlmoil. Filed April 25th, 1883. J. K. Hare, cl'k, by T. H. Kernan, dep'y.

Service of the within on me acknowledged by copy this 28th day of April, 1883.

JAS. K. BYRNE,
Attorney for Def't.

STATE OF CALIFORNIA, *County of Yuba*:

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

E. A. Davis, being first duly sworn, deposes and says that he is one of the counsel for plaintiff in the above-entitled cause; that on the 11th day of January, 1883, he made an affidavit in said cause, and the same was filed herein on the 20th day of said month, which affidavit is hereby referred to and made a part of this affidavit; 155 that on the 20th day of January the said superior court, upon presentation and filing of said affidavit, and also the affidavit of one R. H. McIlmoil, on the motion of counsel for said plaintiff, made its order, which was then duly entered, that said defendant appear before said court on the 2d day of February, 1883, at the court-room thereof, to show cause why it should not be punished for a contempt of said court in not obeying the injunction theretofor duly issued and served in said cause, and that a copy of said order and of said affidavits be served upon either David Cahn or A. S. Bigelow at least eight days before said return day of said order; that said David Cahn was then the person designated by said defendant according to law upon whom all process issued from said court to defendant might be served and said A. S. Bigelow was then the managing agent and superintendent of defendant, residing at Columbia Hill, county of Nevada, in said State; that on the 22d

day of said month affiant proceeded to the city and county of San, Francisco, where said Cahn then resided and where he now resides, as affiant is informed and believes, for the purpose of serving said defendant by delivering to said Cahn said order and
156 affidavits as directed, but was unable to find said Cahn, he
being at the time, as affiant was informed, in the State of New York; that on or about the — day February, 1883, the said counsel for plaintiff represented to said court that no service of said papers upon defendant had been made; whereupon, on motion of said counsel, said court made its further and other order that defendant appear before said court on the — day of March, 1883, at its court-room, and show cause why it should not be punished for said contempt aforesaid, and that said defendant be served with a copy of said order and of said affidavits in the manner as before provided; that thereupon said papers so to be served were delivered to one R. H. McIlmoil for such service upon said Bigelow, but he was unable to find said Bigelow, as will more fully appear from the affidavit of said McIlmoil filed herewith; that, as affiant is informed and believes, said Bigelow was at said time the only person in this State upon whom such service could be made as upon said defendant; that on the 2d day of March, 1883, upon the motion of said counsel for the plaintiff, the said court again made its order, which was duly entered, that said defendant appear before the court on the
157 24th day of the same month and show cause why it should
not be punished for said contempt; that on the 5th day of said month, as appears from the return of the sheriff of the city and county of San Francisco, said sheriff duly served upon said David Cahn, as directed by said order, a copy thereof, and also copies of said affidavits; that after such service was made the plaintiff and its said counsel discovered that shortly prior to such service the said defendant had duly revoked its said appointment of said Cahn as the person upon whom process issued against it as aforesaid might be served, and had appointed said A. S. Bigelow its said agent and superintendent, as the person upon whom to make such service, as a substitute for said Cahn; that on the 24th day of March, 1883, the said court made its other like order for defendant to show cause on the 23d day of April, 1883, why it should not be punished for said contempt aforesaid, and that a copy of said order and of said affidavits he served upon said A. S. Bigelow at least ten days before said return day; that affiant, on the 20th day of March, 1883, sent to R. D. Carter, the sheriff of said county of Nevada, the said order, together wtih a certified copy of the same and of said affidavits, with instructions to serve said copies
158 upon said Bigelow, and that on the 30th day of said month
he received a notification from said sheriff that he had received said papers; that on the 9th day of April, 1883, the said sheriff returned said papers to affiant with the following statement in writing, to wit: "We have made two trips over to Columbia Hill, going over early in the morning March 31st, and went over late last evening, but could not find him (Mr. Bigelow). We have tried to find him and not to put too much mil-age onto you; they say he is

not in the county; was at his residence late last evening, and could not find him this morning; stayed at Columbia Hill last night, but he did not show up." That statement is dated April 7, 1883, and is signed R. D. Carter, sheriff; that the corporation defendant is a foreign corporation, and that said Bigelow, as affiant is informed and believes, is now its only managing agent, superintendent, and person designated in this State upon whom process issued to or against said defendant may be served; that plaintiff has used great diligence and made every reasonable endeavor to serve said defendant with said papers, notices, and process aforesaid, as directed 159 by said several orders; that from all the information he has received he verily believes that said A. S. Bigelow has been and now is wilfully avoiding service of all papers and processes in this action, and that no service thereof can be made upon him, and that there is no other officer of the defendant in this State, as affiant is informed and believes, upon whom such service can be lawfully made.

E. A. DAVIS.

Subscribed and sworn to before me this 19th day of April, 1883.

[SEAL.] J. K. HARE, *Cl'k,*
By T. H. KERNAN, *Dep'y.*

(Endorsed:) Affidavit of E. A. Davis.

Service of the within on me acknowledged by copy this 25th day of April, 1883.

JAS. H. BYRNE,
Attorney for Defendant.

Filed April 25th, 1883.

J. K. HARE, *Cl'k,*
By T. H. KERNAN, *Dep'y.*

160 *Proof of Service of Motion and Notice.*

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

M. D. Sweeney, being duly sworn, deposes and says that he is a white male citizen of the United States, more than twenty-one years of age, is not a party to or in anywise interested in said action, and is competent to be a witness on the trial thereof; that on the 7th day of May, 1883, he served upon S. M. Bliss, Esq., the attorney for plaintiff in the above-entitled cause, the within motion and notice of motion to vacate order to show cause, by depositing a true copy thereof, endorsed on an envelope and addressed to said S. M. Bliss, at Marysville, Yuba county, California, his place of business and residence, in the United States post office, at San Francisco, California, the place of business of Jas. K. Byrne and W. C. Belcher, the attorneys for said defendant, and that he prepaied the postage thereon. Affiant further says that there is regular communication by mail 161 between said city of San Francisco and Marysville, Yuba county, California.

M. D. SWEENEY.

Subscribed and sworn to before me this 8th day of May, 1883.
[SEAL.] LEWIS B. HARRIS,
Notary Public.

Motion to set Aside Order.

In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

Now comes the defendant in the above-entitled cause, and appearing specially and for the purposes of this motion only, and not hereby submitting itself to the jurisdiction of this court, moves the court to vacate and set aside a certain order made by this court on or about the 25th day of April, 1883, of which the following paper, served upon Jas. K. Byrne, one of the attorneys for said defendant, [on] or about the 28th day of April, 1883, purports to be a copy:

162 In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,
vs.
EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

It appearing to the court from the affidavits of R. H. McIlmoil and E. A. Davis, made on the 11th day of January, A. D. 1883, and which are now on file herein, that the defendant in the above-entitled cause, "Eureka Lake and Yuba Canal Company, Consolidated," a foreign corporation engaged in hydraulic mining in the county of Nevada, in this State, was enjoined and restrained by the order of this court from depositing in or suffering to flow into the channel or bed of the Yuba river, or into the channels or beds of the Middle Yuba river or the South Yuba river, or into the tributary streams, gulches, or ravines which lead into said streams, any of the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines, commonly called "mining debris," and that said injunction order was duly served upon said corporation, defendant, on the 9th day of November, A. D. 1882, and that said order is still in full force and effect.

And it further appearing from said affidavit that said corporation,

defendant, on the 29th day of December, A. D. 1882, in wilful
163 and gross disobedience of said injunction order of this court, did deposit in and suffer to flow into the channels and beds of said rivers, and also into the tributary streams, gulches, and ravines which lead into said rivers, a large quantity of tailings from its said hydraulic mines located at or near Columbia Hill, in said county of Nevada, said tailings being generally known as "mining debris," and consisting of earth, sand, clay, sediment and stones;

And it further appearing from said affidavits that at the time of the service, as aforesaid, of said injunction order one A. S. Bigelow was, ever since has been, and still is, the managing agent and superintendent of said corporation, defendant;

And it further appearing from the affidavit of said E. A. Davis, filed herein on the 24th day of March, 1883, that the said A. S. Bigelow is the person appointed and designated by said corporation, defendant, according to law upon whom to serve any process issued to or against it by authority of or under any laws of this State;

And it further appearing to said court by the affidavits of said R. H. McIlmoil and E. A. Davis, this day filed herein, that the managing agent and superintendent of said defendant, and the person appointed and designated by said defendant according to law upon whom to serve any process issued to or against it by authority of or under any law of this State, is one and the same person, to
164 wit, A. S. Bigelow, and that said A. S. Bigelow now is, and for a long time prior to this date has been, persistently avoiding by various means the service on him of orders of said court herein to show cause why said defendant should not be punished *by* contempt in disobeying said injunction and accompanying affidavits:

Now, therefore, it is ordered that the said defendant, "Eureka Lake and Yuba Canal Company, Consolidated," show cause before this court, at the court-room thereof, at the court-house in the city of Marysville, in said county of Yuba, on Monday, the 14th day of May, A. D. 1883, at the hour of ten o'clock a. m. of that day, why it should not be punished for a contempt of and for its refusal to obey and its aforesaid violation of said injunction order of this court. And it is further ordered that service of a copy of this order and of the affidavits herein mentioned, ten days before the return day aforesaid, to wit, said day of May, A. D. 1883, upon J. K. Byrne or N. C. Belcher, Esq., attorneys of record herein for said defendant, shall be sufficient service of this order.

Done in open court this 25th day of April, A. D. 1883.

PHIL. W. KEYSER,
Superior Judge.

165 The grounds upon which this motion is made are as follows:

1st. That said injunction order referred to in said order to show cause was made without authority of law and is absolutely void, for the reason that said superior court of Yuba county had no jurisdiction of the person of the defendant at the time the said order was made and issued.

2d. That said injunction order referred to in said order to show cause was made and issued without authority of law and is absolutely void, for the reason that the judge who made the same was at the time the same was made disqualified by law to make the said order.

3d. That the said injunction order referred to in said order to show cause was made without authority of law and is absolutely void, for the reason that it orders the issuance of an injunction suspending the general and ordinary business of a corporation, to wit, the general and ordinary and only business of the defendant, and was not granted by the court nor by a judge thereof, but was granted by the judge of another court, to wit, by the superior judge of the county of Colusa, and was granted without due notice or any 166 notice whatever to the proper officer or any officer or officers or to the managing agent or any agent of said corporation of the application therefor.

4th. That the said injunction order referred to in said order to show cause was never served on the defendant.

5th. That the order to show cause why defendant should not be punished for contempt of this court in disobeying said order of injunction, a paper purporting to be a copy of which is here-above set forth, was never served upon the defendant.

JAS. K. BYRNE,
W. C. BELCHER.
Atty's for said Def't pro hac vice.

To the plaintiff in the above-entitled action and to S. M. Bliss, Esq., district attorney of the county of Yuba and attorney for plaintiff, and Messrs. Stabler & Bayne and E. A. Davis, of counsel.

Please take notice that on Monday, the 14th day of May, 1883, on the opening of court on said day, or as soon thereafter as counsel can be heard, the above-named defendant will move the court, at the court-room thereof, in the city of Marysville, to vacate and set aside the order of the court referred to in the foregoing 167 motion, which will be made and based upon the files, records, and minutes of the court in the above-entitled action, including all affidavits and papers heretofore filed in said cause.

JAS. K. BYRNE,
W. C. BELCHER,
Atty's for said Def't pro hac vice.

(Endorsed.) Motion and notice of motion to vacate. Order to show cause. Filed May 14th, 1883. J. K. Hare, cl'k, by F. H. Kernan, dep'y.

168 *Minutes of Court.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba

vs.

Eureka Lake and Yuba Canal Company, Consolidated.

Monday, *May* 14, 1883.

Hon. P. W. Keyser, judge presiding.

The motion of the defendant to set aside and vacate the order heretofore made requiring defendant to show cause why it should not be punished for contempt in not obeying the injunction order heretofore made and served in this action this day came on to be heard by the court, J. K. Byrne, Esq., appearing for defendant and Messrs. I. S. Belcher, Stabler & Davis appearing for pl't'ff. Said matter, after being argued by counsel for the respective parties, was submitted to the court; whereupon the court denied the said motion and dismissed the same, to all of which the defendant, by its said counsel, then and there excepted.

169 *Judgment of Superior Court.*

In the Superior Court in and for the County of Yuba, State of California.

County of Yuba

vs.

Eureka Lake and Yuba Canal Company, Consolidated.

Monday, *May* 14*th*, 1883.

Hon. Phil. W. Keyser, judge presiding.

An order having been heretofore made by the court that the defendant appear before the court this day to show cause why it should not be punished for contempt of court in refusing to obey the injunction heretofore issued in this action and served upon defendant, now, on this day, said matter came on to be heard, Messrs. I. S. Belcher, E. A. Davis, and S. J. Stabler appearing for the plaintiff and no person appearing for the defendant, proof of due service of a copy of said order to show cause, and copies of the affidavits mentioned therein, upon defendant as directed by said order was made and filed, the defendant having failed to show cause as required by said order. Said matter was thereupon submitted to the
170 court upon said affidavits, pleadings, and papers on file herein; whereupon it was by the court adjudged that said defendant is guilty of a contempt of this court in refusing to obey said injunction order, and that it pay a fine of $250.00.

171 *Judgment of Superior Court.*

In the Superior Court in and for the County of Yuba, State of Calfornia.

COUNTY OF YUBA

vs.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated.

Now, on this day, it appearing to the satisfaction of said court that the order duly made and given by said court heretofore, to wit, on the 26th day of April, 1883, citing the above-named defendant to show cause on the 14th day of May, 1883, at 10 o'clock a. m. of that day, why it should not be punished for a contempt of said court in disobeying the restraining order and injunction heretofore issued and served herein, was duly served, together with the affidavits on which said order was based, on James K. Byrne, Esq., one of the attorneys of record herein of said defendant, on the 28th day of April, 1883, and that said defendant did not appear on said 14th day of May, 1883, by attorney or otherwise, to show cause as aforesaid, or at all, in relation to said contempt, but made default in said matter of contempt; and now, on this day, said matter was heard 172 by said court upon said order to show cause, and said affidavit and the records and papers in said court and action, and said defendant adjudged by said court to be guilty of a contempt of said court in disobeying said restraining order and injunction, it is therefore by the court now here ordered and adjudged that said defendant pay a fine to the people of the State of California in the sum of two hundred and fifty dollars as a punishment for such contempt, and that execution issue in the name of the people of the State of California against said defendant therefor.

Done in open court this 14th day of May, 1883.

PHIL. W. KEYSER, *Judge.*

Endorsed: Judgment of contempt. Filed May 14th, 1883. J. K. Hare, cl'k, by T. H. Kernan, deputy.

173 In the Superior Court in and for the County of Yuba, State of California.

COUNTY OF YUBA, Plaintiff,

vs.

EUREKA LAKE AND YUBA CANAL COMPANY, Consolidated, Defendant.

To the hon. the supreme court of the State of California:

I hereby certify that the foregoing is a full, true, and correct transcript of the record now remaining before the said superior court of the said county of Yuba in the above-entitled cause and of all thereof.

Witness my hand and the seal of our said court this 11th day of August, A. D. 1883.

PHIL. W. KEYSER, *Judge.*

Attest:

J. K. HARE, *Cl'k,*
[SEAL.] By T. H. KERNAN,
Dep't. Cl'k.

174 *Opinion of the Supreme Court of California.*

In Ban*k*.

The Court: On the authority of Eureka Lake and Yuba Canal Company *v.* The Superior Court of the County of Yuba, No. 9122, *ante,* opinion this day filed, the orders are affirmed.

Filed January 12, 1885.
Rehearing denied Feb. 4th, 1885.

175 *Petitioner for Writ of Review.*

Judgment of the Supreme Court of the State of California. In Ban*k*.

Eureka Lake and Yuba Canal Co., Consolidated, Petitioner,
vs.
The Superior Court of the County of Yuba and the Hon. Phil. W. Keyser, the Judge thereof, Respondent-.
No. 9123.

January 12th, 1885.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the orders of the superior court of the county of Yuba be, and the same are hereby, affirmed.

176 *Clerk's Certificate.*

In the Supreme Court of the State of California.

Eureka Lake and Yuba Canal Company, Consolidated, Plaintiffs in Error,
vs.
The Superior Court of the County of Yuba, Defendant in Error.
9123.

I, J. W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and seventy-five pages, numbered from one to one hundred and seventy-five, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 19th day of May, 1885.

[Seal Supreme Court of California.]

J. W. McCARTHY,
Clerk of the Supreme Court of California.

Endorsed on cover: California supreme court. No. 907. The Eureka Lake and Yuba Canal Company, Consolidated, plaintiff in error, *vs.* The Superior Court of Yuba County & Philip W. Keyser, judge of said court. Filed August 4, 1885.

116-410

Office Supreme Court U. S.
FILED.
DEC 17 1885
JAMES H. McKENNEY.
CLERK.

No. 906.

IN THE

Supreme Court of the United States.

Eureka Lake and Yuba Canal Company Consolidated,

Plaintiff in Error,

vs.

Superior Court of Yuba County et al,

Defendants in Error.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

Filed, ... *1885.*

E

S

Br

pre
the
tha
to

T
to c
or,
mer

No.

In the Supreme Court of the United States.

EUREKA LAKE AND YUBA CANAL COMPANY, CONSOLIDATED,
Plaintiff in Error,
vs.
SUPERIOR COURT OF YUBA COUNTY *et al.*,
Defendant in Error.

(In Error to the Supreme Court of California.)

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

Two cases, almost precisely similar, are involved in the present motion. It has been stipulated, by counsel, that the record in one of the cases, only, need be printed; and that the decision of the Court upon this motion shall apply to both cases.

I.

This is a motion, on the part of the defendant in error, to dismiss the writs of error, under Rule 6 of this Court; or, failing in obtaining such a dismissal, to have the judgments of the Supreme Court of California affirmed.

The judgments here under review were rendered by the Supreme Court of California in the exercise of its original jurisdiction. The cases were brought into that Court by writs of *certiorari*, directed to the Superior Court of the County of Yuba, in that State, the ground therefor being that the Superior Court had rendered two judgments finding the plaintiff in error guilty of contempt of court, in violating an injunction order restraining it from carrying on the business of hydraulic mining, and adjudging it to pay certain fines therefor; which judgments, it is claimed by us, were rendered without due process of law and without jurisdiction of the person of the plaintiff in error.

The plaintiff in error is a foreign corporation; and no service of the order to show cause why it should not be punished for the alleged contempts, was made upon any officer or agent of the corporation, or upon any person other than one of its attorneys in the civil case in which the order of injunction was granted.

In the first case, a motion was made, in the Superior Court, to set aside this service, upon the grounds stated on page 7 of the brief of defendant in error; the attorney of the corporation appearing in that motion specially, and for the purpose of the motion only. The Court denied the motion; the corporation made no appearance or defense to the order to show cause, and judgment was rendered against it by default. In the second case, similar service was made upon the attorney, the corporation made no appearance, and judgment was also rendered by default.

The question as to the validity of this service was decided by the Supreme Court of California against the plaintiff in error, and the judgments and orders of the Superior Court of Yuba County were affirmed.

In affirming the judgments, the Supreme Court of California necessarily decided that service, upon the attorney of the corporation, of the order to show cause why it should not be punished for contempt, was sufficient to give the Superior Court jurisdiction, and to warrant the rendition of the judgments against it, the execution of which would result in a loss to it of its property. We contend that such service was not due process of law, within the meaning of the Constitution of the United States, and was and is an attempt, on the part of the State of California, acting by its highest judicial tribunal, to deprive the corporation of its property, in violation of the prohibition of Section 1 of the Fourteenth Amendment to the Constitution.

This being so, it seems almost too plain for discussion, that this Court has jurisdiction of the causes and subject-matter of the actions, under Section 709 of the Revised Statutes of the United States.

The Supreme Court of California, in deciding this important question of constitutional law against the plaintiff in error, in the cases now before the Court, does not give the reason for its decision, except by referring to a prior decision of one of the departments of the Court (*Golden Gate Consolidated Mining Company* vs. *Superior Court of Yuba County*, 65 Cal. 187), and the reason there given for holding that service upon the attorney is sufficient to give the Court jurisdiction to punish for a contempt, is as follows:

> "The defendant in the action had entrusted its attorneys with the protection of its interests and the defense of its rights. We can see no abuse of authority on the part of the Court in directing that the order to show cause should be served on an attorney, since it was made to appear that the defendant, by reason of its own acts, could not be served personally. The process was suitable, and the mode adopted by the Court conformable to the spirit of the Code." (65 Cal. 192.)

This is deciding, to every intent and for every purpose, that the service spoken of is in accordance with the law of

California; and we respectfully contend that such a law is unquestionably in violation of the Fourteenth Amendment to the Constitution.

The inhibition of the Fourteenth Amendment upon a State, applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments. (*Parrott's Case*, 6 Sawy. 349; Cooley Const. Lim., p. 397). And in every case where the highest Court of a State so interprets the law of the State as to deprive a citizen of life, liberty or property, without due process of law, a federal question necessarily arises, and this Court has jurisdiction to review the action of the State Court, upon a writ of error.

It is obvious that the error into which the Supreme Court of California has fallen, the result of which is to deprive the plaintiff in error of its rights under the Constitution, was caused by overlooking or disregarding the distinction which in law exists between criminal and civil contempts, and the different methods which exist, under the Constitution, for obtaining jurisdiction of the persons of the perpetrators of such offenses, and punishing those who are guilty of them; and in assuming, that because the defendant "entrusted its attorneys with the protection of its interests and the defense of its rights" *in the civil case*, such employment extended to any and every *criminal* or *quasi-criminal* proceeding that might or could collaterally arise out of the civil litigation.

In the case *New Orleans* v. *Steamship Company* (20 Wall. 392), this Court uses the following emphatic language:

> "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue, as if it were a judgment upon an indictment for perjury, committed in a deposition read at the hearing."

And in the case *Baltimore and Ohio Railroad Company* vs. *Wheeling* (13 Grattan, 57), the Supreme Court of Virginia says:

> "A contempt of court is in the nature of a criminal offense, and the proceeding for its punishment is in the nature of a criminal proceeding."

It is well said in the case *Pitt* v. *Davison* (37 Barb., pp. 109, 110):

> "The attorney or solicitor is only authorized to appear and act for the party in all the proceedings which constitute a part of the action. *He has no more authority to appear for the party in other proceedings not forming essentially a part of the action, particularly when they partake of a criminal nature, and involve his liberty*, than he would have authority to appear to answer or plead guilty to an indictment against his client for an assault and battery committed by him on his adversary in consequence of some dispute relative to the question at issue in the civil action. The proceeding relative to the contempt *is a new proceeding*, requiring new authority; if, indeed, the personal appearance of the party can be at all dispensed with."

This case was appealed to the Court of Errors of New York, and there reversed (37 N. Y. 39); but the reasons given by the Appellate Court for its reversal, do not, in the least, detract from the force of the reasoning contained in the foregoing extract.

The last-mentioned decision is cited by counsel for defendant in error in these cases, as authority for the doctrine that service of the order to show cause why a party should not be punished for contempt, may be made upon his attorney. The decision does not sustain that doctrine, in a case where the contempt is criminal, or *quasi* criminal in its nature. The question there involved was the construction of a statute of New York, by which "provision is made that every Court of Record shall have power to punish by fine and imprisonment, or either, parties to suits, and others, for disobedience to any lawful order of such court, whereby the rights or remedies of a party in a cause or matter depending in such court, may be defeated, impaired, or prejudiced." (37 N. Y. 237.)

The effect of that statute, so far as it forms a part of the machinery of the courts of New York for the enforcement of civil remedies, was the only question considered or passed upon by the Appellate Court in that case. That it had no application whatever to criminal contempts, appears conclusively from the following extract:

> "The mode of proceedings adopted in the case at bar was by the order to show cause, and the question is, whether personal service upon the defendant of the order to show cause, with the affidavits upon which it was granted, was necessary.
>
> "The learned judge who gave the opinion of the General Term in the Court below, held that personal service in such cases is indispensable, basing his opinion on the well-settled principle of the common law, that no person shall be condemned unheard.
>
> "If we keep in mind the distinction between proceedings to punish criminal contempts and proceedings as for contempts to enforce civil remedies, we shall see the reason why personal notification of the accusation is, under the principle invoked by the learned judge, INDISPENSABLE in the one case, while it may not be in the other. Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding is, in effect, but an execution of the judgment or order against him." (37 N. Y. 239.)

In that case, as appears by the statement, a judgment requiring the defendant to execute a conveyance to the plaintiff had been rendered after a full hearing; and "a certified copy of the judgment was served upon the defendant, personally; and he was duly required to appear before the referee named in the judgment, at a specified time and place, and make the conveyance under his direction" (p. 236); and it was upon the principle and for the reason that the defendant had had his day in Court, and had had an opportunity to contest his liability, and was personally served with a certified copy of the judgment establishing that liability, that the Court held that service of the order to show cause why he should not be punished for contempt in refusing to obey the mandate of the judgment, might be made upon his attorney.

The Court says: (p. 239) "He is therefore not condemned unheard."

The true purport and meaning of the decision on this point, is well stated in the syllabus (p. 235), as follows:

> "There is a distinction between proceedings to punish for criminal contempts and proceedings as for contempts to enforce civil remedies; in the former cases personal notification of the accusation is necessary."

This is the view taken of this case by the author of *Wells on Jurisdiction of Courts*, a new and valuable text-book, which says (Sec. 193):

> "It is a rule that unless there is a positive order of Court, to be obeyed without delay, or unless the acts are in the presence of the Court, a citation to show cause should first issue, which generally may be served on the attorney, unless in criminal contempts, in which personal notice is necessary."

And the author cites *Pitt* vs. *Davison* (37 N. Y. 235), in support of his text.

In the cases now before the Court, no trial of any issue of fact has ever been had in the original action; no hearing upon the merits; no adjudication of any liability on the part of the defendant. The injunction was issued *ex parte*, on the complaint alone, and the case still stands on demurrer.

In a very recent work, the distinction between civil and criminal contempts is thus defined:

> "Civil contempts are those *quasi* contempts, which consist in failing to do something which the contemnor is ordered by the Court to do for the benefit or advantage of another party to the proceeding before the Court; while criminal contempts are all

those acts in disrespect of the Court, or of its process, or which obstruct the administration of justice, or tend to bring the Court into disrepute; such as disorderly conduct, insulting behavior in the presence or immediate vicinity of the Court, or acts of violence which interrupt its proceedings; also, disobedience to or resistance of the process of the Court; interference with property in the custody of the law; misconduct of officers of the *etc.*"

Rapalje on Contempts, Sec. 21, citing—
Ex-parte Edwards, 11 Fla. 184;
Matter of Watson, 3 Lans. (N. Y.) 408;
People vs. *Cowles*, 4 Keyes (N. Y). 46;
Hawley vs. *Bennett*, 4 Paige Ch. 163;
People vs. *Spaulding*, 10 *id.* 284.

In the case *People ex rel. Hawley* vs. *Bennett*, (4 Paige Ch. 281), it is decided that a party who is committed as for a contempt for the non-payment of costs, or other sums of money, may be discharged from imprisonment upon making an assignment of his property under the insolvent laws; but where a party is committed for the non-payment of a fine, imposed upon him by the Court for the breach of an injunction, he cannot be so discharged. A clear and marked distinction is here drawn between the two classes of contempts. And the same distinction is clearly and forcibly drawn in the case *People* vs. *Cowles*, 4 Keyes, at page 46 and following.

In the case *People* vs. *Spaulding*, (10 Paige Ch. 287), where the same question was under consideration, the Court says:

> " Where the defendant in this Court is ordered or decreed to pay a sum of money, it becomes a debt; and the ordinary precept to commit him for not paying it is in the nature of a *capias ad satisfaciendum*, and the defendant may be discharged under the Insolvent Act, upon a surrender of his property. (*Van Wezel* vs. *Van Wezel*, 3 Paige Ch. Rep. 38.) But where a fine is imposed upon a defendant for a willful contempt, in violating an

> injunction, or for any other criminal conduct of a like nature, he can neither be discharged under the insolvent laws nor under the Bankrupt Act; but he is in the same situation, in this respect, as if such fine had been imposed upon him on a conviction for an assault and battery, or for stealing."

In the case *Phillips* vs. *Welch et al.*, decided by the Supreme Court of Nevada, (11 Nev., 187), the Court (at p. 190) says:

> "If the contempt consists of a refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order in such case is not punitive, but coercive. If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by fine or imprisonment, or both, which is purely punitive. In the former case, the private party alone is interested in the enforcement of the order, and the moment he is satisfied the imprisonment terminates; in the latter case the State alone is interested in the enforcement of the penalty."

The Supreme Court of Nevada cites a number of cases, bearing upon this point, in support of its decision, and from the authorities deduces the following rules:

> "*First*—An act done by one party to an action, in violation of the rights of another party, if it is a contempt, is a distinct criminal offense.
>
> "*Second*—The proceeding to punish it is a distinct criminal proceeding." (11 Nev. 191.)

The offenses for which judgment were rendered in the cases now before the Court, were undoubtedly in their nature *criminal contempts*, as defined by the authorities above cited. In a proceeding to punish for a criminal contempt in violating the injunction, the Superior Court of Yuba County could only obtain jurisdiction of the plaintiff in error by service of the order to show cause upon some one of its agents or officers. The attorney in the original action is not such agent or officer. His authority extends only to the conduct of the proceedings in the civil case, and he in no respect represents the contemnor in the criminal proceeding, which is, as we have seen, wholly different and distinct from the other. No substituted service can confer jurisdiction in a case of criminal contempt.

The doctrine announced by the Supreme Court of California in these cases, in holding that the service upon the attorney was sufficient to give the Court jurisdiction, is equally obnoxious to the letter and spirit of the Constitution.

The protection afforded by the Constitution to individuals, or natural persons, applies as well to corporations and their property.

> *County of Santa Clara* vs. *S. P. R. R. Co.*, 9 Sawy. 165.

Speaking of the principle for which we are here contending, the Supreme Court of New York, in the case *Stuart* vs. *Palmer* (74 N. Y. 190), says:

> "It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these without due process of law has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and it is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the Legislature cannot do nor authorize to be done. Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. (*Weimer* vs. *Brueinbury*, 30 Mich., 201.) This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

II.

We will devote but little time or space to the consideration of the motion to affirm. It is not pretended that the writ of error was taken for delay, and the sole ground of the motion to dismiss is that the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument.

We think the Court will hardly consider the question a frivolous one; and there being no color of right to a dismissal, the motion to affirm must be denied under the rule laid down in *Whitney* vs. *Cook*, 99 U. S. 607.

Respectfully submitted.

W. W. COPE,

Counsel for Plaintiff in Error.